91-1910

Supreme Court, U.S.
FILED
MAY 27 1992
OFFICE OF THE CLERK

No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT J. BYKOWICZ, E. ANNE BYKOWICZ, PATRICK J. ROURKE, TERRY L. ROURKE, WALTER E. ALLEN, PAULA J. ALLEN, JERRY R. ANDERSON, LINDA G. ANDERSON, PATRICK W. KLEM, JANET T. KLEM, SIDNEY W. McARTHUR, and MARY JEAN McARTHUR,

Petitioners,

vs.

ICM MORTGAGE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ronald J. Restrepo
Doyle, Reed, Restrepo,
Harvin & Robbins
4700 Texas Commerce Tower
600 Travis Street
Houston, Texas 77002
(713) 228-5100

Kathleen Cynthia Pickett*
Kathleen Cynthia Pickett
& Associates
1776 Yorktown, Suite 150
Houston, Texas 77056
(713) 961-1855

May 27, 1992

**Counsel of Record for Petitioners*

91

Questions Presented

1.

Whether the Court of Appeals' use of a standard of review permitting it to consider and rely on disputed evidence from an interested witness that was contrary to the jury's negligence findings in overturning those findings is improper, as another Court of Appeals has held based on the Seventh Amendment and prior Supreme Court precedent.

2.

Whether the Court of Appeals denied Petitioners' Seventh Amendment right to a jury trial by summarily reversing, in a single page of its opinion, the jury's negligence findings based solely on the contradicted testimony of a witness whose credibility was rejected by jury, without discussing the substantial fact and expert evidence supporting the jury's findings.[1]

---

[1] In the District Court and Court of Appeals, numerous other issues were raised, many relating to the validity of Petitioners' claims under a Texas real estate fraud statute. Petitioners do not raise these issues here.

List of Parties

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed, with the exception of Pulte Home Corporation. Pulte Home Corporation was a party to the proceeding in the Court of Appeals but is not a party in this proceeding. Because no Petitioner is a corporation, no further listing is required under Rule 29.1 of the Rules of the Supreme Court of the United States.

Table of Contents

Questions Presented i

List of Parties ii

Table of Authorities v

Table of Conventions ix

Opinions Below 2

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 2

1. Breach of Duty 4

2. Causation 7

Reasons for Granting the Petition 9

I. THIS CASE RAISES IMPORTANT QUESTIONS OF CONSTITUTIONAL SIGNIFICANCE REGARDING THE PROPER SCOPE OF APPELLATE REVIEW OF JURY FINDINGS. 9

A. The Standard of Review Followed by The Court of Appeals Allowing it to Rely on Controverted Evidence Contrary to the Jury's Findings to Overturn Those Findings is in Conflict With the Decisions of Other United States Courts of Appeals on the Same Matter and Contravenes

the Constitutional Prohibition Against the Reexamination of Jury Findings. 9

B. Decisions of this Court Compel Use of the More Limited Standard of Review, While the Fifth Circuit's Standard Conflicts With Those Decisions 15

C. The Fifth Circuit Deprived the Homeowners of Their Seventh Amendment Right to a Jury Trial by Reweighing the Evidence and Reassessing the Credibility of the Witnesses. 22

II. THE COURT OF APPEALS' DECISION AFFORDS A GOOD OPPORTUNITY FOR THIS COURT TO CONFIRM ITS EARLIER DECISIONS, INSURE COMPLIANCE WITH THE SEVENTH AMENDMENT AND RESOLVE THE CONFLICTING DECISIONS OF THE COURTS OF APPEALS 23

Conclusion 27

Appendices

A -- Opinion of the Court of Appeals

B -- Final judgment entered by the district court

C -- Order of the Court of Appeals regarding rehearing

Certificate of Service

Table of Authorities

Cases: **Page(s)**

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) 20

Atlantic and Gulf Stevedors, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S.Ct. 780 (1962) 19

Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258 (3rd Cir. 1987), *cert den'd*, 488 U.S. 1004, 109 S.Ct. 782 (1989) 13

Black Gold Marine, Inc. v. Jackson Marine Co., Inc., 759 F.2d 466 (5th Cir. 1985) 11

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) 9-12, 14, 20, 21, 23, 25, 26

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 104 S.Ct. 1949 (1984) 21

Brady v. Southern Railroad, 320 U.S. 476, 64 S. Ct. 232 (1943) 13

Brock v. Merrell Dow Pharmaceutical, Inc., 874 F.2d 307 (5th Cir. 1989), *cert. den'd*, 494 U.S. 1046, 110 S.Ct. 1511 (1990) 20

Corinne Mill, Canal & Stock Co. v. Toponce, 152 U.S. 405, 14 S.Ct. 632 (1894) 18

Crisman v. Odeco, Inc., 932 F.2d 413
(5th Cir.), *cert. den'd*, ___ U.S. ___,
112 S.Ct. 337 (1991) 16

Dace v. ACF Indus., Inc., 722 F.2d 374
(8th Cir. 1983) 10, 11, 14, 20

Dehydrating Process Co. v. A.O. Smith Corp.,
292 F.2d 653 (1st Cir. 1961)
cert. den'd, 368 U.S. 931, ... 14

District of Columbia v. Pace, 320 U.S. 698,
64 S.Ct. 406 (1944) 21

Gallick v. Baltimore and Ohio R.R. Co., 372 U.S.
108, 83 S.Ct. 659 (1963) 23

Galloway v. United States, 319 U.S. 372,
63 S.Ct. 1077 (1943) 22, 24, 27

Granberry v. O'Barr, 866 F.2d 112
(5th Cir. 1988) 22

Gulf Consol. Services, Inc. v.
Corinth Pipeworks, S.A., 898 F.2d 1071
(5th Cir.), *cert. den'd*,
___ U.S. ___, 111 S.Ct. 256 (1990) 13, 22

Gunning v. Cooley, 281 U.S. 90,
50 S.Ct. 231 (1930) 19

Harte-Hanks Communications, Inc. v.
Connaughton, 491 U.S. 657,
109 S.Ct. 2678 (1989) 20

Hepburn v. Dubois, 37 U.S. 743, 9 L.Ed. 345 (1838) . . . 17, 22

Hernandez v. New York, ___ U.S. ___,
111 S.Ct. 1859 (1991) 22

Inventive Music Ltd. v. Cohen, 617 F.2d 29
(3rd Cir. 1980) 14

Jacob v. City of New York, 315 U.S. 752,
62 S.Ct. 854 (1942) 15

Lavender v. Kurn, 327 U.S. 645,
66 S.Ct. 740 (1946) 21

Layne v. Vinzant, 657 F.2d 468 (1st Cir. 1981) 14

Lumbra v. United States, 290 U.S. 551,
54 S.Ct. 272 (1934) 18

Magnat Corp. v. B&B Electroplating Co.,
358 F.2d 794 (1st Cir. 1966) 14

Masson v. New Yorker Magazine, Inc.,
___ U.S. ____, 111 S.Ct. 2419 (1991) 19, 20

Morgan v. Arkansas Gazette, 897 F.2d 945
(8th Cir. 1990) 10

Nicholson v. Rushen, 767 F.2d 1426
(9th Cir. 1985) 14

Pagan v. Shoney's, Inc., 931 F.2d 334
(5th Cir. 1991) 23

Parsons v. Bedford, Breedlove & Roberson,
28 U.S. (3 Pet.) 433 (1830) 26

Richardson v. Suzuki Motor Co., Ltd.,
868 F.2d 1226 (Fed. Cir.),
cert. den'd, 493 U.S. 853,
110 S.Ct. 154 (1989) 21

Schwimmer v. Sony Corp. of Am., 459 U.S. 1007,
103 S. Ct. 362 (1983)
(White, J., dissenting) 24

Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970) 15

Smith v. Firestone Tire and Rubber Co.,
875 F.2d 1325 (7th Cir. 1989) 15

Tapia v. Tansy, 926 F.2d 1554 (10th Cir. 1991) 22

Tol-O-Matic, Inc. v. Proma Productk-Und
Marketing Gesellschaft, 945 F.2d 1546
(Fed. Cir. 1991) 15

United States Environmental Protection
Agency v. City of Greenforest, 921 F.2d 1394
(8th Cir. 1990), *cert. denied*,___ U.S. ___,
112 S. Ct. 414 (1991) 10

United States v. United States Gypsum Co.,
333 U.S. 364, 68 S.Ct. 525 (1948) 21

Van Blargan v. Williams Hospitality Corp.,
759 F. Supp. 940 (D.P.R. 1991) 20

Wilkerson v. McCarthy, 336 U.S. 53,
69 S. Ct. 413 (1949) 11-13, 15-18

Wilson v. Monarch Paper Company, 939 F.2d
1138 (5th Cir. 1991) 9

Wright v. Commercial Union Ins. Co., 818 F.2d 832 (11th Cir. 1987) 15

Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980) 15

Constitutional and Legislative Authorities

U.S. Const., Amend. VII . . . . . passim

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332(a) 3

Other Authorities:

Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237 (1989) 24

Table of Conventions

The following convention is used in this petition:

"T" [volume, page] (trial transcript)
"P. Ex." (Plaintiffs' Exhibit)
"D. Ex." (Defendants' Exhibit)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT J. BYKOWICZ, E. ANNE BYKOWICZ, PATRICK J. ROURKE, TERRY L. ROURKE, WALTER E. ALLEN, PAULA J. ALLEN, JERRY R. ANDERSON, LINDA G. ANDERSON, PATRICK W. KLEM, JANET T. KLEM, SIDNEY W. McARTHUR, and MARY JEAN McARTHUR,

Petitioners,

vs.

ICM MORTGAGE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, who were Plaintiffs in the District Court and Appellees in the Court of Appeals, ask that a writ of certiorari be issued to review the judgment issued by the United States Court of Appeals for the Fifth Circuit on January 6, 1992.

Opinions Below

The opinion of the Court of Appeals is reported at 950 F.2d 1046 and is reproduced as Appendix A. The final judgment entered by the United States District Court for the Southern District of Texas was not reported but is reproduced as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit is dated, and was entered, on January 6, 1992. That Court denied a timely petition for rehearing and suggestion for rehearing *en banc* by order dated and filed on February 27, 1992. (See Appendix C.) This petition is filed within ninety days of that date and, therefore, is timely. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision Involved

The United States Constitution, Amendment VII, provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Statement of the Case

Petitioners are six couples (collectively the "Homeowners") who purchased homes from Pulte Home Corporation ("Pulte"), one of the largest builders of moderately priced "tract" homes in the United States (P. Ex. 84), and obtained their mortgages from Pulte's wholly-owned subsidiary, ICM Mortgage Company ("ICM"). In connection with their decision to purchase these homes, each couple was given a marketing document known as an "Investment Quotation" stating, among other information, monthly property tax

payments (Tr. 7-33 to 35; 8-19, 23 and 24). This tax information came directly from tax charts prepared by ICM's Vice President, Mr. Stephen Harshfield (Tr. 2-32; 7-36; P. Ex. 86). The tax figures misrepresented the true tax amounts, resulting in increases in Homeowners' monthly payments of between $75 and $150, representing as much as a 35% increase (Tr. 3-76 to 86). In addition to other damages, because of the resulting financial hardships, three of the six couples lost their homes to foreclosures, two were forced to move and one was able to keep their home only because the FHA assumed the loan after concluding that ICM's misconduct caused that couple's inability to make their increased monthly payment (Tr. 2-139; 6-33 to 36; 5-14 to 15; 5-149 to 151).

The Homeowners filed suit against ICM and Pulte in July of 1985 in Texas state court attacking the propriety of the tax information. In their lawsuit, the Homeowners sought damages on theories of gross negligence and violations of Texas statutes providing relief to persons injured by fraud in connection with a real estate transaction and deceptive and unconscionable conduct in connection with a consumer transaction.[2] Thereafter, Pulte and ICM removed the case to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1332(a).

After a three-week jury trial, the jury found that ICM was grossly negligent, had committed actual fraud and had "knowingly" violated the DTPA in its preparation of the tax charts underlying the Investment Quotations. The jury further found that Pulte had defrauded the Homeowners. Based on the jury's findings, the District Court entered judgment in the Homeowners' favor for the violations of Section 27.01 and ICM's gross negligence, awarding statutory damages (including pre-judgment interest and attorneys' fees) of $618,990.37 and punitive damages of $1.35 million. The

---

[2] The real estate fraud statute is codified at Tex. Bus. & Com. Code Ann. § 27.01 (Vernon 1987) ("Section 27.01"). The consumer protection statutes are codified as the Texas Deceptive Trade Practices - Consumer Protection Act, Tex. Bus. & Com. Code Ann. § 17.41 *et seq.* (Vernon 1987) ("DTPA").

District Court denied Pulte and ICM's motions for new trial and judgment n.o.v.

In reversing that portion of the District Court's judgment based on the jury's negligence findings,[3] the Court of Appeals discussed and relied exclusively on Mr. Harshfield's disputed testimony contrary to the verdict, holding that "no reasonable juror could find that the evidence here supported a finding of breach of duty or causation." The Court of Appeals fails to discuss any of the substantial fact and expert evidence the Homeowners adduced during the three-week trial that contradicts Mr. Harshfield's testimony and supports the jury's findings. Following is a brief discussion of the Homeowners' evidence of (1) breach of duty and (2) causation.

1. Breach of Duty.

The Court of Appeals' finding that ICM had not breached any duty it owed to the Homeowners was based solely on its acceptance of Mr. Harshfield's testimony that he "used 70 percent of the assessed value" because "his research indicated that the values used [by appraisers] were not one hundred percent of market." Appendix A at 5, 14-15. However, the Court of Appeals failed to review substantial contrary evidence supporting the jury verdict. For example, the Court of Appeals fails to discuss the extensive testimony and opinions of the Homeowners' expert, Mr. Randal Mozingo, a registered professional appraiser with substantial experience regarding taxes on new tract homes such as the Homeowners' in some of the very subdivisions and during the very time in question in this lawsuit (Tr. 3-7 to 8, 10, 11). Mr. Mozingo co-authored a book on these issues, a book Pulte and ICM purchased for their own use after this lawsuit was filed (Tr. 3-7 to 8; 9-38 to

---

[3] As previously stated, Petitioners do not seek review of the Court of Appeals' reversing that portion of the judgment based on the Section 27.01 claims because the underlying issues involve only the interpretation of Texas state law, issues outside the scope of the considerations discussed in Rule 10 of the Rules of the Supreme Court of the United States.

40).

Mr. Mozingo, admittedly an expert in the area, opined that tax computations should have been based on 100% of value, not 70% (Tr. 3-16 to 18, 41, 46, 50 to 53 and 59 to 60). This conclusion was based not only on Mr. Mozingo's personal experience, research and expertise but also on the undisputed evidence that Mr. Harshfield's successor at ICM, Mr. Robert Zambie, also determined that tax computations should be based on 100% of value (Tr. 3-59 to 60). Mr. Zambie in fact used 100%, not 70%, of value for his tax charts (Tr. 4-37 and 41 to 42). Mr. Mozingo also reached the unrebutted conclusion, confirmed by basic common sense, that the 70% across-the-board ratio, which the Court of Appeals found that Mr. Harshfield had used, cannot justify Mr. Harshfield's admitted use of but one tax figure for 16 different subdivisions with tax rates varying by 33% -- approximately $1 per $100 of valuation (Tr. 3-46, 56).

Mr. Harshfield himself must have known of his grossly negligent calculations because he knew that a much smaller variation -- $.23 per $100 of valuation -- would increase the monthly tax payment by $15 per month (Tr. 7-180 to 182), yet he gave the *same* tax figure where there was a $1 variance in tax rates (Tr. 7-182; P. Ex. 5). Mr. Mozingo's analysis led him to conclude that Mr. Harshfield's after-the-fact explanation "would show having never called a tax office or an appraisal district, having never even tried to do any investigative work on it at all" (Tr. 3-46, 57).

If Mr. Harshfield had calculated taxes by subdivision, as ICM's experts conceded was reasonable and necessary (Tr. 8-228 to 229; 9-43), a 70% ratio would have resulted in separate tax numbers for each subdivision, which admittedly was not the case (P. Exs. 2, 10). As Mr. Mozingo explained, given the wide range of tax rates, the use of a single figure for dozens of subdivisions demonstrated that ICM's tax figure was only "just a shot in the dark" (Tr. 3-34). This evidence supports Mr. Mozingo's conclusion that Mr. Harshfield was lying when he said he performed a study and used a 70% ratio based on that study (Tr. 3-75) and supports the jury's

having rejected Mr. Harshfield's testimony in its entirety.

There also was other evidence that Mr. Harshfield never conducted that research. For example, Mr. Harshfield conceded that there was not a single document in ICM's files reflecting *any* such research (Tr. 7-140). The *only* documented use of the 70% figure was at a meeting of angry homeowners where, knowing in advance he would be questioned about his computations, Mr. Harshfield attempted to reconstruct the $77 figure given to one of the Homeowner couples. Mr. Harshfield used the 70% ratio, but it resulted in a monthly tax figure of $99, not $77 (Tr. 7-140 to 143).

After the lawsuit was filed, Mr. Harshfield changed his calculations to attempt to justify the $77 tax figure. The only way he could do so was to apply a 51%, not a 70%, ratio. He justified this newest ratio by stating it was the appraisal level for certain model homes (Tr. 150). The Homeowners demonstrated and the jury must have believed that this was a fabrication because the model home information upon which Mr. Harshfield said he had relied for comparability purposes was substantially and materially false (Tr. 7-153 to 155). This evidence negates the validity of Mr. Harshfield's alleged "research," the sole basis for the Court of Appeals' finding that ICM was not negligent.

Other than Mr. Harshfield's contradicted and impeached testimony, there is *no* evidence that mass appraisal techniques in fact resulted in appraisals as low as 70%, and there is substantial contrary evidence. Mr. Mozingo stated that he personally had appraised many hundreds of subdivisions, often being the only appraiser for new tract homes, and "definitely" always used 100% of sales price as the assessed value for new tract homes (Tr. 3-23 to 24, 45, 50 to 53); he had never heard of a 70% ratio (Tr. 3-45). Even Mr. Privett, one of ICM's experts, agreed that, for new homes, "most of the mass appraisals I have seen, two or three that I have seen, have used [100%] market price, sales price" (Tr. 8-204). That Mr. Harshfield could not have done what he claimed to have done also is reasonably inferred from the fact that ICM never asked its two experts to duplicate the supposed "study" or to opine on the

reasonableness of Mr. Harshfield's methodology, although one of the experts had previously intended to do just that type of analysis (Tr. 8-225 to 226, 228, 234; Tr. 9-64 to 66). A third expert who was assigned this task (Tr. 9-66) never testified at trial.

In any event, the use of the 70% ratio assumed by the Court of Appeals would still have been grossly negligent because it fails to account for the uniformly acknowledged response of Texas appraisers if their appraisals were less than the required 100% of value. Put simply, the jury was entitled to conclude that ICM was grossly negligent even if it had used a 70% ratio, because the immediate and expected reaction of any appraisal authority to such a low appraisal ratio would be to increase it to the 100% level required by Texas law. Mr. Mozingo so concluded (Tr. 3-41 to 42, 45, 50-53, 66). Mr. Privett, who had never even done an appraisal (Tr. 8-201 to 202), recounted this inexorable process in one of the tax districts involved in the suit (Tr. 8-206 to 209). Mr. Kalousek, ICM's tax appraisal expert, agreed that, if appraisals were less than 100% of market value, he would increase the appraisal to the mandated 100% level (Tr. 9-31). Mr. Mozingo therefore properly concluded, as did the jury, that Mr. Harshfield's tax figures were "preposterous" and "show[ed] a total disregard, to me, of any of the potential home buyers" (Tr. 3-75).[4]

2. Causation.

The Court of Appeals concluded that reappraisals, not understated tax figures, were the *sole* cause of the acknowledged deficiencies in the Homeowners' tax escrow accounts. Appendix A at 15. The source of this factual conclusion was a statement in

---

[4] The actual appraisal levels of the Homeowners' homes also proves the point. The appraisals for five of the homes ranged between 88% and approximately 100% of value, not 70% (Tr. 9-49 to 56). Initially, the appraisal level of the McArthurs was 67% – yet the ICM tax figure of $95 still was $37 low (Tr. 9-55). Significantly, once the appraisal authorities noticed their error, they promptly increased the appraised value of the McArthurs' home at closer to 100% its value (D. Ex. 79).

ICM's appellate brief, for which no record support was given. At best, the only circumstantial record support again is the unsubstantiated and conclusory testimony of Mr. Harshfield attempting to avoid responsibility for his misconduct. However, Mr. Mozingo concluded, based on his study of appraisals of the Homeowners' homes and the Investment Quotations, that ICM's gross negligence caused the damages (Tr. 3-82 to 86). Moreover, of the six homes, only one -- the McArthurs' -- was reappraised at a higher value, but that reappraisal caused only $17 of the $75 increase in their monthly taxes caused by the understated tax figure (P. Ex. 26; D. Ex. 79; Tr. 3-83 to 85). Given its findings, the jury must have rejected Mr. Harshfield's testimony and accepted that of Mr. Mozingo.

There also was substantial evidence that the Investment Quotation figures related to future years, evidence never discussed by the Court of Appeals, including the Homeowners' testimony that they understood this to be the case based on what they were told by Pulte (Tr. 4-76 to 78; 5-16 to 18 and 79; 6-19 to 20; 63 to 64, 71 and 96). Other evidence also supports this understanding (P. Exs. 32 to 43). The Court of Appeals reweighed this evidence and attacked the Homeowners' credibility by stating that: "[n]eedless to say, it would be impossible to predict three years out the amount needed for taxes and insurance." Appendix A. Yet this is precisely what Pulte and ICM said they were doing, and the suggestion that it was impossible merely serves to demonstrate ICM's callousness, not its blamelessness.

The Court of Appeals' reliance on the "Important Notices" also is misplaced. Liability was based on the fact that the false tax information induced the Homeowners to enter into their purchase contracts. The Homeowners signed their contracts later the same day as, or in one case 10 days after, they received their Investment Quotations but weeks or months *before* receipt of the Notices (D. Exs. 2, 3, 6, 21, 22, 25, 31, 32, 35, 54, 55, 58, 69, 70, 73, 80, 81, 84). Therefore, any disclosure in the Notices was too little and too late. The Homeowners also were never given these Notices until the uniformly rushed closings; not surprisingly, none recalled seeing the

Notices until they were shown the Notices at their depositions in this case (Tr. 2-116 to 118; 4-83 to 84, 155 to 158, 5-39 to 40, 61 to 62, 82-83; 6-26 to 27, 72 to 74, 102 to 107). In any event, the Notices are irrelevant because there is no evidence that reappraisals were the sole cause of the Homeowners' damages.

Reasons for Granting the Petition

I. THIS CASE RAISES IMPORTANT QUESTIONS OF CONSTITUTIONAL SIGNIFICANCE REGARDING THE PROPER SCOPE OF APPELLATE REVIEW OF JURY FINDINGS.

A. The Standard of Review Followed by The Court of Appeals Allowing it to Rely on Controverted Evidence Contrary to the Jury's Findings to Overturn Those Findings is in Conflict With the Decisions of Other United States Courts of Appeals on the Same Matter and Contravenes the Constitutional Prohibition Against the Reexamination of Jury Findings.

In reexamining the jury's findings, the Court of Appeals only considered and relied upon evidence contrary to the verdict -- the controverted and impeached testimony of Mr. Harshfield, an interested witness whose credibility was rejected by the jury but accepted by the Court of Appeals. Although it did not specifically cite the Fifth Circuit authorities permitting it to analyze this evidence contrary to the jury's findings, the Court of Appeals follows the standard announced in its seminal decision in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*). *See, also e.g., Wilson v. Monarch Paper Company*, 939 F.2d 1138, 1142 (5th Cir. 1991). In *Boeing*, the Fifth Circuit acknowledged that it is the jury's exclusive function to weigh conflicting evidence and inferences and determine the credibility of witnesses but held that, in reexamining the jury's findings, it "should consider all of the evidence -- not just that evidence which supports the non-mover's [here the

Homeowners'] case." 411 F.2d at 374-375.[5] This standard is still employed by the Fifth Circuit.

This standard of review mandates a significantly broader reexamination of jury findings than is permissible under two more restrictive standards used by other Courts of Appeals. At the other end of the spectrum from the Fifth Circuit is the United States Court of Appeals for the Eighth Circuit, which has held that appellate courts may review only the evidence supporting the jury's findings in assessing the reasonableness of those findings. *See, e.g., United States Environmental Protection Agency v. City of Greenforest*, 921 F.2d 1394, 1410 (8th Cir. 1990), *cert. denied*, _____ U.S. _____, 112 S. Ct. 414 (1991); *Morgan v. Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990); *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376-377 (8th Cir. 1983). In *Dace*, the Eighth Circuit discussed the three reasons supporting this limitation on appellate review of jury findings: (1) the Seventh Amendment; (2) Supreme Court precedent; and (3) common sense.

With respect to the constitutional underpinning for the limited scope of its review, the Eighth Circuit determined that, although its formulation would probably result in fewer instances of taking a case from the jury than where judges were free to do so based on a broader reanalysis of the evidence,

> This is a price, we think, worth paying for the jury system, which is enshrined in the Bill of Rights and sanctified by centuries of history. When questions of fact are involved, common sense is usually more important than technical knowledge, and twelve [or six] heads are better than one.

---

[5] Throughout many of the opinions discussing the standard of review, the courts refer to movants, non-movers or use similar descriptions. Because the standard of review is the same for a motion for directed verdict and a motion for judgment n.o.v., *Boeing*, 411 F.2d at 370; Rule 50(b), Fed. R. Civ. P., the movant is functionally the same as a party against whom the jury has found, while the non-mover is the party who secured favorable jury findings.

722 F.2d at 377. The Court further held that this standard was particularly necessary where, as in the instant case, virtually all of the moving party's evidence came from interested witnesses, all of which was contradicted by other evidence. The mere fact that a witness is interested requires that the jury be allowed to determine the issue. 722 F.2d at 377 n.6.

Furthermore, in *Dace*, the Eighth Circuit reasoned that its standard of review was mandated by the Supreme Court's holding that:

> It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury, we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a preemptory instruction has been given.

722 F.2d at 376, *quoting Wilkerson v. McCarthy*, 336 U.S. 53, 57, 69 S. Ct. 413, 415 (1949). To follow the same standard, the Court must assume the truth of all evidence supporting the party opposing the motion. 722 F.2d at 376. Finally, the Eighth Circuit reasoned that its standard of review is the common sense corollary of the established rule, recognized even by the Fifth Circuit, that appellate courts may not consider questions of credibility in assessing jury findings.[6]

> That statement necessarily implies that evidence favorable to the moving party may not be considered, because if it were the court would have to pass on the credibility of that party's witnesses.

722 F.2d at 376.

---

[6] *See, e.g., Black Gold Marine, Inc. v. Jackson Marine Co., Inc.*, 759 F.2d 466, 470 (5th Cir. 1985); *Boeing*, 411 F.2d at 375.

While *Boeing* is uniformly followed in Fifth Circuit decisions reviewing jury verdicts, none of these decisions, other than *Boeing*, attempts to justify adopting a standard permitting appellate courts to review all the evidence in reexamining the jury's findings. A close analysis of *Boeing* demonstrates that the Fifth Circuit essentially creates this standard out of whole cloth and then holds that it is a permissible standard because there are no authorities precluding its use. Thus, the Court distinguishes this Court's holding in *Wilkerson* that "all the evidence should not be considered," by simply stating that *Wilkerson* was an FELA case and that FELA cases are *sui generis*. 411 F.2d at 375 n.16.

Similarly, in rejecting any constitutional objections, the Fifth Circuit states that the Seventh Amendment "does not require, either expressly or impliedly, that the test of sufficiency of evidence to create a jury question in a non-FELA federal case be the same as in an FELA case." 411 F.2d at 373. Apparently, the Court concludes that an FELA plaintiff has greater constitutional rights to have his or her case decided by a jury than non-FELA plaintiffs. The Fifth Circuit cites no authority supporting this proposition and must even sidestep significant contrary decisions of this Court by denigrating those decisions as a "tendency of some federal courts [primarily the Supreme Court] to use overly broad language or to cite indiscriminately FELA cases in non-FELA situations. . ." *Id.* (citations omitted). Finally, the Fifth Circuit never offers a solution to the riddle of how the Court of Appeals could review the entire record, including evidence contrary to the jury's finding, without weighing conflicting evidence and inferences or determining the credibility of witnesses.

It was for precisely these reasons that Judge Rives wrote a lengthy and well-reasoned opinion in *Boeing*, dissenting from the new standard of review created by the majority, warning that,

> . . . [the majority] commits an error of constitutional proportions which will continue to plague this Court and the district courts of this circuit until the Supreme Court grants certiorari in this or some

future case, and corrects the error.

411 F.2d at 378 and n. 2 (Rives, J., concurring and dissenting). Judge Rives states that the *Wilkerson* standard is a constitutional standard, based on his extensive analysis of Supreme Court precedent, 411 F.2d at 379, 384-86, concluding:

> Other Supreme Court decisions have established that it is the jury trial guaranteed by the Seventh Amendment which is "part and parcel of the remedy" in the FELA actions in federal courts. Indeed, it seems an unwarranted affront to suggest that the Supreme Court, by mere fiat, has invented for FELA cases a kind of jury trial found neither in the Constitution nor in the Act.

411 F.2d at 386. Furthermore, as Judge Rives noted, the commonly accepted standard for determining the absence of a controverted issue of fact in all cases was initially delineated in a FELA case, *Brady v. Southern Railroad*, 320 U.S. 476, 64 S. Ct. 232 (1943), and there is no reason to require use of that standard, taken from a FELA case, while holding that the *Wilkerson* standard does not govern a non-FELA case because FELA cases are *sui generis*. 411 F.2d at 389.

The Homeowners respectfully submit that Judge Rives correctly analyzes the constitutional underpinning of the limited scope of review allowed by the Supreme Court in *Wilkerson* permitting the Courts of Appeals to review only the evidence supporting a jury in determining the reasonableness of that verdict. Any other standard would empower a Court of Appeals to reweigh the evidence and redetermine the credibility of the parties. In this respect, it is well-established that the jury is entitled to disregard entirely the testimony of a witness whom it finds is not credible and to choose between conflicting testimony. *See, e.g., Gulf Consol. Services, Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071, 1077 (5th Cir. 1990) cert. den'd ___ U.S. ___, 111 S.Ct. 256 (1990); *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 262 (3rd Cir. 1987),

cert. den'd 488 U.S. 1004, 109 S.Ct. 782 (1989); *Nicholson v. Rushen*, 767 F.2d 1426, 1427 (9th Cir. 1985). The Fifth Circuit's standard therefore allows the Court to reverse a jury finding based on evidence that the jury had every right to disregard entirely, for example, in this case, the testimony of Mr. Harshfield.[7]

The absence of authority supporting the *Boeing* standard is demonstrated by the Fifth Circuit's inability to cite any decisions supporting its holding that it "should consider *all* of the evidence and not just that evidence which supports the non-mover's case," while citing numerous cases supporting each other component of its standard of review. 411 F.2d at 375 n. 16 (emphasis supplied by Court). The two First Circuit cases cited in footnote 16 hold only that appellate courts may review "uncontradicted evidence" offered by the non-movant. *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653, 656 n. 6 (1st Cir.), *cert. den'd*, 368 U.S. 931 (1961). *See also Magnat Corp. v. B&B Electroplating Co.*, 358 F.2d 794, 797 n. 4 (1st Cir. 1966) (holding in *Smith* was only that Court of Appeals "could look, to some extent, to the defendant's evidence"). None of the remaining cases cited in footnote 16 directly supports the Fifth Circuit's proposition.

The standard of review enunciated by the First Circuit in *Smith* and later confirmed in *Magnat* is a third standard, pursuant to which the appellate courts look only at evidence supporting the verdict or opposing evidence that is uncontradicted.[8] *Layne v. Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981). *See Inventive Music*

---

[7] In this respect, the Court of Appeals in effect takes back the power it concedes belongs exclusively to the jury. Thus, Basic Instruction 4 of the Fifth Circuit's *Pattern Jury Instructions, Civil Cases* (1983 ed.) states that the jury members are the "sole judges" of the witnesses' credibility and that, based on their assessment, the jury may "accept or reject the testimony of any witness in whole or in part." The jury in this case was given these instructions and must be allowed to follow them.

[8] In *Dace*, the Eighth Circuit stated that, under certain circumstances, this standard might be warranted. 722 F.2d at 377 n. 6.

Ltd. v. Cohen, 617 F.2d 29, 33 (3rd Cir. 1980) (in reviewing jury verdict for plaintiff, question on appeal is whether there is "uncontradicted, credible and unimpeached evidence supporting the defendants' theory of the case").[9]

Under either of the more limited standards for reviewing the jury's negligence findings in this case, the Fifth Circuit could not have overturned those findings because it could not have considered and relied upon the controverted and impeached testimony of Mr. Harshfield, an interested witness. The Fifth Circuit standard is constitutionally flawed precisely because it allows the appellate courts to redetermine the credibility of witnesses such as Mr. Harshfield, without an opportunity to observe their demeanor or hear their testimony, and to reweigh the evidence. Thus, as occurred in this case, the standard mandates improper intrusion by the Court of Appeals into the jury's exclusive fact-finding role. Rather than intruding on this function, the courts must jealously guard the constitutional right to trial by jury. *Jacob v. City of New York*, 315 U.S. 752, 752-753, 62 S.Ct. 854 (1942).

B. Decisions of this Court Compel Use of the More Limited Standard of Review, While the Fifth Circuit's Standard Conflicts With Those Decisions.

The primary reason for the conflicting standards enunciated by the Fifth and Eighth Circuits is their disagreement regarding the scope of this Court's opinion in *Wilkerson*. While the Eighth Circuit concluded that the broadly worded holding in *Wilkerson* governs any

---

[9] While other Courts of Appeals apply the same standard of review as the Fifth Circuit, those other courts do not analyze the rationale for doing so. *See, e.g., Tol-O-Matic, Inc. v. Proma Produckt-Und Marketing Gesellschaft*, 945 F.2d 1546, 1549 (Fed. Cir. 1991); *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989); *Wright v. Commercial Union Ins. Co.*, 818 F.2d 832, 834 (11th Cir. 1987); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980); *Simblest v. Maynard*, 427 F.2d 1, 5 and ns. 3 and 4 (2d Cir. 1970);

federal appellate court review of jury findings, the Fifth Circuit disagrees, reading that same language as being limited to the review of jury verdicts in FELA cases.[10] Without explaining precisely why, other than stating that FELA cases are *sui generis*, the Fifth Circuit does not apply the *Wilkerson* standard in other types of cases.

A careful reading of *Wilkerson* and other Supreme Court precedent, demonstrates that there is no basis for applying a different standard in non-FELA (or Jones Act) cases. In *Wilkerson*, the Supreme Court noted its concern that the Utah Supreme Court's finding the absence of negligence as a matter of law "rested on that Court's independent resolution of conflicting testimony." 336 U.S. at 55, 69 S.Ct. at 414. After reiterating the general rule that negligence issues must be submitted to the jury if there is conflicting evidence, the Court stated it had granted certiorari "because of the importance of preserving for litigants in FELA cases their right to a jury trial." *Id.*

Because of the jury's constitutional function, this Court in *Wilkerson* recited the "established rule" that it "need only look to the evidence and reasonable inferences which tend to support the case" of the non-movant. 336 U.S. at 57, 69 S.Ct. at 415. Applying the rule, this Court reversed and concluded that it was inappropriate for the appellate court to have resolved the conflicting evidence. 336 U.S. at 60, 69 S.Ct. at 416. The Court further held that "the issue of negligence is one for juries to determine." 336 U.S. at 61-62, 69 S.Ct. at 417. Thus, an analysis of the *Wilkerson* decision demonstrates not that FELA plaintiffs have broader constitutional rights to a jury trial but, rather, that the Supreme Court was attempting to insure that FELA plaintiffs were given the same measure of jury rights as non-FELA negligence plaintiffs.

---

[10] Apparently because of the perceived similarity between FELA cases and Jones Act cases, the Fifth Circuit has determined that the *Wilkerson* standard applies in Jones Act cases. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 417 n. 4 (5th Cir.), *cert. den'd*, ___ U.S. ___, 112 S.Ct. 337 (1991).

In fact, this Court had established the constitutional mandate limiting appellate review of a jury's findings to evidence in support of those findings in non-FELA cases over 110 years before adopting that standard in *Wilkerson*. *See Hepburn v. Dubois*, 37 U.S. 743, 9 L.Ed. 345 (1838). In *Hepburn*, the Court bristled at the suggestion that it should overturn the jury's findings based on its own analysis of the evidence:

> In urging upon this court a review of parol evidence in the record, we think the counsel of the plaintiff in error have asked us to transcend the limits prescribed to our action on questions of fact, by a uniform course of decision from the first organization of this court, which has been repeatedly defined during the present term, in our opinions, unanimous on the law; though sometimes differing in its application to particular cases. If our past course of adjudication has not sufficed to satisfy the bar, as to what we have considered our most solemn duty, and if it is yet an open question as to what is the line which the law has drawn between those questions of fact cognizable only by the jury below, and questions of law arising on the joint action of the court and jury, in that court whose record we judicially inspect on error; it will be useless to attempt to close it by any opinion to be delivered in this case.
>
> This court is committed in language which it neither can nor desires to recall; because that [constitutional] power which we are bound to obey has spoken to us, and all the courts in the United States in terms most imperative.

37 U.S. at 744, 9 L.Ed. at 375-376. The Court then listed a series of rules the Seventh Amendment compelled appellate courts to follow rigidly, the last of which was:

> [T]he finding of the jury on the whole evidence in a cause must be taken as negativing all facts, which the party against whom their verdict is given, has attempted to infer from, or establish by the evidence.

37 U.S. at 745, 9 L.Ed. at 376. In other words, only the jury was entitled to consider Mr. Harshfield's testimony, as part of the "whole evidence in the cause." Because the jury's findings negatived his testimony, that testimony cannot be resurrected on appeal to overturn the jury's findings.

This standard also is enunciated in at least two other pre-*Wilkerson*, non-FELA cases. *See Lumbra v. United States*, 290 U.S. 551, 553, 54 S.Ct. 272, 273 (1934) (appellate court must "assume as established all the facts that evidence *supporting* petitioner's claims reasonably tends to prove") (emphasis added); *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U.S. 405, 14 S.Ct. 632 (1894). Indeed this Court's recitation of the standard of review in *Corinne Mill* is remarkably similar to the then "established" rule in *Wilkerson*:

> It is unnecessary to refer to the testimony which tends to weaken the scope of these general statements of the plaintiff . . . because such conflict presents but a mere question of fact, upon which the verdict of the jury is conclusive. . . .
>
> It is unnecessary to consider the contradictory testimony, or to attempt to determine the actual facts in reference to this matter. It is enough that the jury, by their verdict, have practically affirmed the truth of plaintiff's story, . . .

Little wonder that, by 1949, the Court did not hesitate to describe as "established" the rule limiting analysis of a jury's findings to the evidence *supporting* those findings.

This Court also has undertaken the same type of analysis in other non-FELA negligence cases, focusing only on evidence supporting a jury finding. *See, e.g., Gunning v. Cooley*, 281 U.S. 90, 50 S.Ct. 231 (1930). In *Gunning*, plaintiff brought suit for negligence against her physician. In reviewing the jury's finding of negligence, the Court determined that the appropriateness of allowing the jury to decide the case depends upon whether there is any evidence "upon which the jury can properly proceed to find a verdict *for the party producing it*, upon whom the onus of proof is imposed." 281 U.S. at 94, 50 S.Ct. at 233 (citations omitted) (emphasis added). Thus, the Court focuses only on the evidence produced by the plaintiff and corroborating evidence in upholding the jury's negligence finding. 281 U.S. at 97-98, 50 S.Ct. at 234.

Similarly, in *Atlantic and Gulf Stevedors, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S.Ct. 780 (1962), the Supreme Court reversed the appellate court's overturning a jury verdict, again based on the constitutional underpinning for the jury's function in resolving fact issues:

> We might agree with the Court of Appeals [on the negligence issue] had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

369 U.S. at 358-359, 82 S.Ct. at 783.

Further confirmation that appellate review of jury findings must be based only on evidence in support of those findings is provided in this Court's recent decision in *Masson v. New Yorker Magazine, Inc.*, _____ U.S. _____, 111 S.Ct. 2419 (1991). In that case, the plaintiff filed a libel suit against a publisher and author, claiming that he never made quotes attributed to him. Although a

portion of the interview was taped, the offending quotes came from untaped portions which, the defendants contended, were contained in transcripts prepared by the author. The defendants secured a summary judgment on the basis that the plaintiff could not prove the necessary scienter. This Court reversed, reasoning that it must assume the truth of the plaintiff's contention that he never made the statements attributed to him. 111 S.Ct. at 2435.

Of critical importance to the standard of review issue presented herein, this Court in *Masson* specifically rejected the defendants' argument that the Court was required to look at the manuscripts as well as the tapes to determine whether the summary judgment should be affirmed. *Id.* The Court reviewed only the evidence supporting the plaintiff's claim and held that "only a trial on the merits will resolve the factual dispute" whether the publication was made with the requisite scienter. *Id.* Although *Masson* involved the standard of review on a motion for summary judgment, that standard "mirrors the standard for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). The standard for entry of judgment n.o.v., in turn, is the same as that for a directed verdict. *See, e.g., Brock v. Merrell Dow Pharmaceutical, Inc.*, 874 F.2d 307, 308 (5th Cir. 1989), *cert. den'd*, 494 U.S. 1046, 110 S.Ct. 1511 (1990); *Dace*, 722 F.2d at 376; *Boeing*, 411 F.2d at 370.[11] Therefore, the Court of Appeals in this case should have declined to review evidence contrary to the jury's negligence finding, as this Court declined to look at the manuscripts in *Masson*.

Moreover, in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678 (1989), the Court was equally protective of the jury's right to resolve factual disputes and to determine the witnesses' credibility, even where that role is

---

[11] In fact, at least one court hs held that the standard for review of a motion for judgment n.o.v. is even more stringent than that for review of a motion for new trial. *Van Blargan v. Williams Hospitality Corp.*, 759 F. Supp. 940, 942 (D.P.R. 1991).

diminished because of First Amendment implications requiring a *de novo* analysis of any finding of actual malice. In reviewing the jury's finding of actual malice in that case, the Court initially concluded that, given the jury charge and findings, the jury "*must* have rejected" the testimony of the numerous defense witnesses. 491 U.S. at 690, 109 S.Ct. at 2697 (emphasis supplied by Court). The Court then held that the finding of actual malice "inextricably follows" when "these findings are considered alongside the undisputed evidence." *Id.* Thus, even in the First Amendment fact-finding context, the Court accepted the jury's credibility determinations, resolved fact controversies in light of those determinations and thereafter focused only on the undisputed evidence, thereby giving greater deference to the jury's findings than is given under the *Boeing* standard in non-First Amendment cases.

The conclusion that appellate courts should not overturn jury findings based on evidence contrary to those findings is further supported by the differing standards of review where the trier of fact is the jury and where the trier of fact is the court. As this Court has held, district court's findings of fact are reviewed under a "clearly erroneous" standard, allowing a reexamination of the fact finding "when although there is evidence to support it, the reviewing court *on the entire evidence* is left with a definite and firm conviction that a mistake has been committed." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1959 (1984), *quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948) rehearing den'd 333 U.S. 869, 68 S.Ct. 788 (1948) (emphasis supplied by Court).

On the other hand, a jury's findings "have from time immemorial been subject to different rules of finality." *District of Columbia v. Pace*, 320 U.S. 698, 701, 64 S.Ct. 406, 408 (1944). A narrower standard of review applies to jury findings, "a standard that gives greater deference to the judgment simply because appellate review is more limited, compared with review of a trial judge's decision." *Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226, 1235 (Fed. Cir.), *cert. den'd*, 493 U.S. 853, 110 S.Ct. 154 (1989) (*citing Pace*, 320 U.S. at 702, 64 S.Ct. at 408 and *Lavender v.*

Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 744 (1946)). Even the Fifth Circuit has acknowledged the more limited scope of appellate review where jury fact findings are involved. *Granberry v. O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988). The Homeowners submit that it is precisely because of the more limited permissible scope of review of jury findings that appellate courts are not free to base their review "on the entire evidence," as is allowed under the more expansive "clearly erroneous" standard.

C. The Fifth Circuit Deprived the Homeowners of Their Seventh Amendment Right to a Jury Trial by Reweighing the Evidence and Reassessing the Credibility of the Witnesses.

The Seventh Amendment requires that the jury be allowed to resolve conflicting evidence, to weigh the evidence and to determine the credibility of the witnesses. *See Galloway v. United States*, 319 U.S. 372, 396, 63 S.Ct. 1077, 1090 (1943); *Hepburn v. Dubois*, 37 U.S. 743, 744-745, 9 L.Ed. 345, 375-376 (1838). Moreover, as the Court held in *Galloway*, this constitutional guaranty "permits expert opinion to have the force of fact when based on facts which support it." *Id.* Even under the more expansive review permitted by the "clearly erroneous" standard, proper deference must be given to the fact-finder's resolution of conflicting expert opinions. *See Gulf Consol. Services, Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071, 1077 (5th Cir. 1990). As this Court held in *Hernandez v. New York*, _____ U.S. _____, 111 S.Ct. 1859 (1991), a trier of fact's finding cannot be clearly erroneous where the fact finder simply chooses between two permissible views of the evidence. 111 S.Ct. at 1871-1872.[12]

---

[12] In *Hernandez*, the Court noted that uncontradicted testimony contrary to a finding of fact is the type of situation where the clearly erroneous standard would require reversal. 111 S.Ct. at 1871. Similarly, in *Tapia v. Tansy*, 926 F.2d 1554 (10th Cir. 1991), the Court held that the testimony of a witness whose credibility had been accepted by the jury could not be disregarded on appeal unless it was "inherently incredible," being for example physically impossible or against the laws

Despite these constitutional limitations, in but one page of its opinion, the Fifth Circuit overturned the jury's negligence findings in this case and rejected Mr. Mozingo's opinions, without discussion. The Court of Appeals disregarded the substantial fact and expert evidence submitted by the Homeowners that supports the jury's negligence findings, opting instead to accept without reservation the controverted and unsupported conclusions of Mr. Harshfield, an interested witness. The Court of Appeals thereby deprived the Homeowners of their fundamental right to have their claims resolved by a jury, not some distant court who has never seen them or their expert or Mr. Harshfield. *See generally Gallick v. Baltimore and Ohio R.R. Co*, 372 U.S. 108, 113-115, 83 S.Ct. 659, 663-664 (1963).[13]

II. THE COURT OF APPEALS' DECISION AFFORDS A GOOD OPPORTUNITY FOR THIS COURT TO CONFIRM ITS EARLIER DECISIONS, INSURE COMPLIANCE WITH THE SEVENTH AMENDMENT AND RESOLVE THE CONFLICTING DECISIONS OF THE COURTS OF APPEALS.

The issue on which the Homeowners seek this Court's review presents a constitutional problem of major import. *Boeing*,

---

of nature. In *Tapia*, the Tenth Circuit held that even "[c]onfused, self-contradicting testimony by a drug addict does not make the witness's testimony inherently incredible" because any inconsistencies are a matter for the jury to resolve. 926 F.2d at 1562. None of the Homeowners or their expert suffered any such disabilities, yet their testimony was disregarded.

[13] What the Fifth Circuit essentially did was to determine that, in its perception, the verdict was contrary to the great weight and preponderance of the evidence, which is the standard for the trial court's granting a new trial in its discretion. *See, e.g., Pagan v. Shoney's, Inc.*, 931 F.2d 334, 336-337 and n. 1 (5th Cir. 1991). However, where, it is the Court of Appeals that makes this determination, the parties are prevented from ultimately having a jury decide their case because, as here, judgment is rendered against them, and they are not given an opportunity for a new trial.

411 F.2d at 377 (Rives, J., concurring and dissenting), *citing Galloway v. United States*, 319 U.S. 372, 63 S. Ct. 1077 (1943). Even the majority in *Boeing* concedes that the conflicting standards of review are "substantially different." 411 F.2d at 373. As Justice White commented in his opinion dissenting from the denial of a writ of certiorari in analogous circumstances:

> Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the federal courts of appeals is of far more than academic interest.

Schwimmer v. Sony Corp. of Am., 459 U.S. 1007, 1009, 103 S. Ct. 362, 364 (1983) (White, J., dissenting).

This case represents an excellent opportunity for this Court to resolve the conflicting standards, especially in light of the Court's earlier rulings precluding the unlimited review of the evidence mandated by the Fifth Circuit. The opinion of the Court of Appeals makes it clear that it was relying exclusively on the testimony of Mr. Harshfield in overturning the jury's gross negligence findings. This evidence obviously was rejected by the jury and is contrary to the jury's findings. Furthermore, a review of the evidence not discussed by the Court shows not only that Mr. Harshfield was an interested witness but also that his testimony was contradicted by substantial evidence adduced by the Homeowners and Pulte's and ICM's experts. Therefore, to continue to countenance the Fifth Circuit's standard of review would be to authorize wholesale appellate reexamination of the record, including reweighing the evidence and redetermining the credibility of the witnesses, despite the Seventh Amendment proscription.

Furthermore, the Fifth Circuit's continued use of a standard of review allowing it to supersede the jury in finding facts, eviscerating the Seventh Amendment in the process, and the results of applying that standard in this case are merely symptomatic of a deeper malady that is detailed at greater length in Mr. Eric Schnapper's exhaustive article *Judges Against Juries – Appellate*

Review of Federal Civil Jury Verdicts, 1989 Wis. L. Rev. 237 (1989). In that article, Mr. Schnapper reports the startling results of his study of all published federal appellate decisions for the one-year period from October, 1984 through October, 1985: of the 208 cases addressing the sufficiency of evidence supporting a jury verdict, the appellate courts overturned the jury's findings in 102 cases – an overall reversal rate of 49% that is probably even lower than today's rate. *Id.* at 246-247.

As Mr. Schnapper laments, over the past 20 years, the Courts of Appeals have not felt constrained by the Seventh Amendment because, for that same period of time, this Court "has systematically declined to grant review in any case asserting that such a seventh amendment violation had occurred." *Id.* at 238. One of the many examples specified where the appellate courts have improperly intruded into the jury's constitutional functions is precisely that confronting the Homeowners. Specifically, Mr. Schnapper determined that "the rule forbidding consideration of the evidence of the losing party is now virtually a dead letter." *Id.* at 295. The time is ripe "to reinvigorate the fundamental principles temporarily trampled underfoot." *Id.* at 354. This case presents an excellent opportunity to do so, as it represents a clear and unrepentant example of using a standard that violates the Seventh Amendment and decisions of the Court going back over 150 years.

The results of continued use of the *Boeing* standard are obvious and detrimental not only to the continued viability of parties' constitutional right to a jury trial but also to judicial economy. Parties who lose jury verdicts, such as Pulte and ICM, are quickly learning that, in federal court, jury findings simply represent the first step in the ultimate resolution of fact disputes. This strategy will make parties more intransigent in settlement negotiations and will further clog the already over-crowded federal appellate dockets, encouraging losing parties to seek a redetermination of the facts on appeal. Mr. Schnapper's study demonstrates that this unfortunate strategy has been successful because of this Court's non-intervention.

Only those with deep pockets or a zealous interest in a case will be able to withstand this process, as evidenced by what has transpired in this case. Specifically, after six years of extensive litigation, one District Judge's twice denying motions for summary judgment raising the same issues addressed on appeal, a jury trial, and another District Judge's overruling their post-trial motions, Pulte and ICM were able to undo everything by securing a reversal of the jury's gross negligence findings in one page of a Court of Appeals' opinion. The further result is that Pulte and ICM are now seeking costs of approximately $85,000 from the Homeowners for their years of efforts and success. The cost of losing would have been substantially less.

Continued application of the *Boeing* standard will only further erode the Seventh Amendment's protections and undermine the very reasons for that Amendment. As Justice Storey wrote over 150 years ago,

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.

Parsons v. Bedford, Breedlove & Roberson, 28 U.S. (3 Pet.) 433, 445-446 (1830). The countervailing obstacle is that about which Justice Black warned:

> Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain.

Galloway v. United States, 319 U.S. 372, 407, 63 S. Ct. 1077, 1096 (1942) (Black, J., dissenting).

The Homeowners respectfully submit that it is time for this Court to confirm that the Seventh Amendment's guarantee of a trial by jury and prohibition against the reexamination of jury findings must outweigh the desire of Courts of Appeals to broaden their power to review a jury's findings. Otherwise, the Courts of Appeals will remain free to rely on the testimony of an interested witness whose credibility has been destroyed and whose testimony has been contradicted by a host of fact and expert witnesses to reach what the Court, rather than the jury, may believe to be proper findings of fact.

Conclusion

For the foregoing reasons, the Court should grant the petition and review the decision of the Court of Appeals for the Fifth Circuit.

Dated: May 27, 1992.

Respectfully submitted,

Ronald J. Restrepo

Kathleen Cynthia Pickett
Counsel of Record

Appendix A

Robert J. BYKOWICZ, et al.,
Plaintiffs-Appellees,

v.

PULTE HOME
CORPORATION, et al,
Defendants-Appellants.

No. 90-2923.

United States
Court of Appeals,
Fifth Circuit.

Jan. 6, 1992

Home buyers brought action against home seller and its subsidiary mortgage company alleging gross negligence and violation of Texas deceptive trade practices statute prohibiting fraud in real estate transactions after buyers' property taxes in years subsequent to their purchase failed to reflect escrow account estimates given by defendants. The United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., rendered judgment on jury verdict for buyers and appeal was taken. The Court of Appeals, Barksdale, Circuit Judge held that: (1) defendants did not violate fraud statute, and (2) buyers failed to established gross negligence.

Reversed and rendered.

1. Consumer Protection - 3

Texas deceptive trade practices statute prohibiting fraud in real estate transactions is penal in nature and must be strictly construed. V.T.C.A., Bus. & C. § 27.01.

2. Consumer Protection - 34

Reliance and materiality elements of Texas statute prohibiting fraud in real estate transactions are the same as those for Texas common-law

Synopsis Syllabi and Key Number Classification
COPYRIGHT © 1992 by WEST PUBLISHING CO.

The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

fraud. V.T.C.A., Bus. & C. § 27.01.

3. Consumer Protection - 34

To succeed on claim under Texas deceptive trade practices statute prohibiting fraud in real estate transactions, plaintiff's reliance on defendant's fraudulent conduct must be justifiable as well as actual, and such justifiability is determined by inquiring whether, given plaintiff's individual characteristics, abilities and appreciation of facts and circumstances at or before time of alleged fraud, it is extremely unlikely that there is actual reliance on plaintiff's part. V.T.C.A., Bus. & C. § 27.01.

4. Consumer Protection - 34

In addition to proving justifiable reliance, plaintiff asserting claim under Texas Deceptive Trade Practices statute prohibiting fraud in real estate transactions must prove materiality of alleged misrepresentations. V.T.C.A., Bus. & C. § 27.01.

5. Consumer Protection - 8

Home buyers were not entitled to damages, under Texas deceptive trade practices statute prohibiting of fraud in real estate transactions, against home seller and its subsidiary mortgage company, which had prepared escrow account property tax estimates and incorporated them into investment quotations, based on taxes for years subsequent to ones covered by investment quotations, inasmuch as quotations stated that they were estimates and were based on current prices and interest rates which were subject to change. V.T.C., Bus. & C. 27.01.

6. Consumer Protection - 8

Home seller and its subsidiary mortgage company, which prepared escrow account property tax estimates and incorporated them into investment quotations signed by home buyers, did not falsely represent any past or

existing material fact as would render them liable to home buyers under Texas deceptive trade practices statute prohibiting fraud in real estate transactions; even if buyer had shown damages arising from differences in taxes paid for years covered by investment quotations, tax figures in quotations were labeled as estimates, quotations stated that prices and rates were subject to change, and buyers were notified at closing that their property would be reevaluated at beginning of following year and that their taxes would be computed on that reevaluation. V.T.C.A., Bus. & C. § 27.01.

7. Deposits and Escrows - 13

Mortgage company did not breach any duty to home buyers when it issued estimated escrow account property tax figures on basis of percentage of appraised value, inasmuch as Texas law required tax appraisers, not mortgage companies, to appraise at 100% of market value. V.T.C.A., Tax Code § 26.02.

8. Negligence - 56(1.12), 59

There are two elements to proximate cause under Texas law: cause in fact and foreseeability.

9. Negligence - 56(1.2)

Cause in fact under Texas negligence law is established if injury would not have occurred "but for" allegedly wrongful act.

10. Negligence - 59

Under Texas negligence law, foreseeability requires that injury complained of be of such general character as might reasonably have been anticipated from defendant's conduct.

11. Deposits and Escrows - 13

Home buyers failed to show how escrow account property tax estimates prepared by mortgage company were cause in fact of their paying higher property

taxes in subsequent years and their mental anguish, as was required to recover against mortgage company for gross negligence under Texas law; tax differentials alleged as damages were differentials that occurred in years subsequent to those for which tax estimates were prepared, reappraisals of property were the events which resulted in higher taxes, and buyers had been put on notice that tax information on which estimates were based was subject to change.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, WILLIAMS and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

At issue in this Texas diversity action is whether escrow account property tax estimates prepared and used by Pulte (based on charts prepared by ICM) in housing sales constitute a "false representation of a past or existing material fact ... made ... for purposes of inducing" persons to purchase from Pulte, using mortgages from its subsidiary, ICM, in violation of Tex. Bus. & Com. Code Ann. § 27.01 (Vernon 1987); and whether ICM's actions also constitute gross negligence. A jury found that they did; we REVERSE and RENDER.

I.

Six married couples (plaintiffs) bought new houses from Pulte in 1983 and 1984.[1] The houses were constructed by Pulte in the greater Houston area, including Harris and Fort Bend Counties. Plaintiffs purchased them with mortgages provided by ICM, Pulte's wholly-owned subsidiary.

When plaintiffs expressed interest in a particular house, a Pulte sale representative prepared a one-page

Investment Quotation and provided it to them. In addition to listing the mortgage interest rates and the monthly principal, interest, and insurance payments, it listed the monthly property tax escrow payments. The tax information was derived from tax charts prepared and furnished by Stephen Harshfield, an ICM officer. The charts were used by ICM for loan qualification purposes and to estimate the escrow amounts necessary to pay property taxes on homes it financed. The following statement set in all capital letters, was included in the Investment Quotation.

> INFORMATION IS ESTIMATED AND BASED ON CURRENT PRICES AND INTEREST RATES, WHICH ARE SUBJECT TO CHANGE WITHOUT NOTICE. TAXES AND INSURANCE ARE ESTIMATED.[2]

Plaintiffs alleged that Pulte and ICM incorrectly calculated the tax estimates, derived by multiplying the appraised value by the tax rate. In support, they maintain that the appraised value is equivalent to the purchase price of the home; and that Texas law provides that properties should be assessed at one hundred percent of market value and that the property must be appraised at market value. On the other hand, Pulte and ICM contend that appraised value should reflect the discounting of purchase price as was used in mass appraisal techniques at the time the estimates were prepared. Harshfield testified that he used 70 percent of the assessed value, because "in Harris County and Fort Bend County, taxes ran in the range of 50 to 75 percent or 50 to 70 percent of assessed value."

Later, at closing, ICM gave plaintiffs a document entitled ICM IMPORTANT NOTICE CONCERNING FUTURE PROPERTY TAXES & MAINTENANCE FEES. It was signed by plaintiffs and stated in part:

> Your monthly payment reflects a deposit in your escrow account on the basis of estimated improved property taxes. At the beginning of next year, your property will be reevaluated and your taxes computed on that reevaluation. Your monthly payments for [the next year] may or may not reflect a tax increase based on that reevaluation.

A comprehensive reappraisal was conducted in the Houston area in the 1980's.[3] It took place in Harris County in 1984 and in Fort Bend County in 1985.[4] Accordingly, the tax escrow amounts stated in the Investment Quotations were inadequate. As a result, ICM increased the amount of the monthly payments to cover the shortages and to avoid them in the future.[5]

Plaintiffs sued in state court on behalf of themselves and all others similarly situated, seeking relief under Tex.Bus. & Com. Code Ann. § 27.01 and, alternatively, for negligence, gross negligence, and violations of the Texas Deceptive Trace Practices-Consumer Protection Act (DTPA), Tex. Bus. & Com. Code Ann. § 17.41 *et seq.* (Vernon 1987). Among other things, the tax increase allegedly caused four couples to lose their houses. *See* note 5. After removal, the district court denied class certification; and, following a three-week trial, the jury found that both Pulte and ICM had violated § 27.01 and, also, that ICM was negligent and grossly negligent and had violated the DTPA.

The annual differences between the Investment Quotation estimate and the actual taxes were relatively small. For example, for the Allens, it was approximately $550 a year for 1985-1987; for the Rourkes, approximately $400 a year for 1984-1986. Plaintiffs' compensatory damages included this difference, as well as other elements, including mental anguish. Each couple was also awarded exemplary damages of $225.000.[6]

The district court granted plaintiffs' request that final judgment be entered only under § 27.01 (first cause of action) and for gross negligence (second cause of action), with plaintiffs, within thirty days following the exhaustion of any final appeal, to make an election of remedy. This appeal followed the denial of Pulte and ICM's motion for judgment notwithstanding the verdict or in the alternative for new trial.

II.

Pulte and ICM contend that (1) the tax estimates do not constitute actionable misrepresentations of past or existing material fact under § 27.01; (2) there is insufficient evidence of ICM's knowledge of the falsity of any actionable misrepresentation upon which to base liability against it under § 27.01(d); (3) there is insufficient evidence of gross negligence; (4) the district court erred in several of its evidentiary rulings, constituting reversible error; and (5) it erred in awarding attorneys fees, damages for mental anguish, and exemplary damages. Because we reverse and render based on the first three points, we need not reach the last two.[7]

"The standard for appellate review of a jury's verdict is exacting. The verdict must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to contrary." *Granberry v. O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988) (quoting *Western Co. of North Am. v. United States*, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 464 U.S. 892, 104 S.Ct. 237, 79 L.Ed.2d 228 (1983)). "'If there is evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the jury function may not be invaded." *Id.* (quoting *Western Co. of North Am.*, 699 F.2d at 276).

A.

Section 27.01 provides in pertinent part:

(a) Fraud in a transaction involving real estate ... consists of a

(1) false representation of a past or existing material fact, when the false representation is

(A) made to a person for the purpose of inducing that person to enter into a contract; and

(B) relied on by that person in entering into that contract; ...

(b) A person who makes a false representation or false promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for actual damages.

(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(e) Any person who violates the provisions of this section shall be liable to the person defrauded for reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of

court.

Tex.Bus. & Com.Code Ann. § 27.01 (Vernon 1987). As noted, although ICM did not present the estimate to plaintiffs, it was found liable under § 27.01(d).

[1,2] Section 27.01 is penal in nature and must be strictly construed. *Ratcliff v. Trenholm*, 596 S.W.2d 645, 650 (Tex.Civ.App.--Tyler 1980, writ ref'd n.r.e.). Because it contains the elements of common law fraud, its reliance and materiality elements are the same as those for Texas common law fraud. *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1025 n. 4 (5th Cir. 1990) (citing *Richardson v. Salinas*, 336 F.Supp. 997, 1000 (N.D.Tex.1972)).

[3,4] To succeed on a § 27.01 claim, a plaintiff's reliance on "the defendant's fraudulent conduct must be justifiable as well as actual." *Id.* at 1025. Such "justifiability" is determined by inquiring whether--"given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud--it is extremely unlikely that there is actual reliance on the plaintiff's part." *Id.* at 1026; *see General Motors Corp., Pontiac Motor Div. v. Courtesy Pontiac, Inc.*, 538 S.W.2d 3, 6 (Tex.Civ.App.--Tyler 1976, no writ) (no justifiable reliance where representations were such that any person of normal intelligence, experience, and education "'would recognize at once as preposterous ... or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth'"). In addition to proving (justifiable) reliance, and as provided in § 27.01(a)(1) ("past or existing material fact"), a fraud plaintiff must prove materiality. *Haralson*, 919 F.2d at 1030. "Only representations of material facts are actionable under [a common law fraud theory]." *Id.* (citing *Trenholm*, 646 S.W.2d at 931).

Pulte and ICM maintain that the estimates (a) referred only to the year in which the Investment Quotation was prepared and as such could not constitute actionable misrepresentation for future years; (b) were not representations of fact, but statements of opinion; (c) were at best opinions of law which are not actionable in Texas; and (d) were based on information equally available to both parties and therefore could not be actionable under Texas law.

Richman Trusts v. Kutner, 504 S.W.2d 539 (Tex.Civ. App.--Dallas 1973, writ ref'd n.r.e.), addressed the meaning of § 27.01 "past or existing material fact." There, a purchaser of a shopping center sued for fraud. *Id.* at 540. In connection with the purchase, the vendor had provided a written statement concerning the center, including detailing income and expenses incident to its operation. *Id.* at 542. Under "Annual Expenses", it listed $297 for insurance. *Id.* The purchaser contended that following the closing of the sale on March 7, 1969, he discovered that the insurance policy had expired on March 14, 1969. *Id.* The renewal premium was $1,221. *Id* There was not dispute that the cost of insurance during the three previous years was $297. *Id.*

The *Richman Trusts* court affirmed a summary judgment for the vendor, holding: "The only representation of a *past* or *existing material fact* made by [the vendor] to [the purchaser] was that the present cost of insurance was $297 per year. This statement or representation was the expression of an existing fact and was not false." *Id.* at 543 (emphasis in original). The court held there was not misrepresentation of past or existing material fact, even though the vendor "admitted knowing that renewal rates were to be higher in the future and did not communicate this information to [the purchaser]." *Id.* The court went on to note that "even if [the vendor] had represented that *future* insurance costs would remain the same such

representation of a *future* fact would not be actionable under that statute." *Id.* (emphasis in original).

[5] Pulte and ICM maintain that the district court erred in allowing plaintiffs to recover damages resulting from increased taxes paid for post-purchase tax years. As described in notes 5 and 8, plaintiffs recovered, as part of their damages, the difference between the taxes paid for those years and the amount stated in their Investment Quotations for the year of purchase--a year not in issue.

The tax estimates refer only to the year in which they were prepared.[8] Moreover, as noted, the Investment Quotation states: "INFORMATION IS ESTIMATED AND BASED ON CURRENT PRICES AND INTEREST RATES, WHICH ARE SUBJECT TO CHANGE WITHOUT NOTICE. TAXES AND INSURANCE ARE ESTIMATED." The Investment Quotation does not make any representation regarding future taxes.

Three couples received their Investment Quotations in 1983; They sought damages incurred as a result of taxes for tax year 1984 and several subsequent. The other three couples received their Investment Quotations in 1984. They sought damages incurred as a result of taxes for several tax years beginning in 1985.[9] Because the Investment Quotations stated that they were estimates and were based on current prices and interest rates which were subject to change, it was improper to allow damages based on taxes for years subsequent to the one covered by the Investment Quotation.

[6] As noted, § 27.01 concerns fact, not opinion. In the alternative, Pulte and ICM also contend that the tax estimates were not representations of fact, but statements of opinion. An estimate is defined as "the act of appraising or valuing[;] ... an opinion or judgment of the nature, character, or quality of a person or thing[;] ... a

rough or approximate calculation." Webster New Collegiate Dictionary 426 (9th ed. 1989). Under Texas law, an expression of opinion is generally not actionable in fraud. *McCollum v. P/S Investments, Ltd.*, 764 S.W.2d 252, 254 (Tex.App.--Dallas 1988, writ denied). In *McCollum*, a real estate broker showed the plaintiff a cover letter dated six months earlier from a real estate appraiser, stating the value of an apartment complex. *Id.* at 253-54. The plaintiff purchased the complex without seeing the complete appraisal or visiting the property. *Id.* at 253.

The *McCollum* court noted that an exception to the general rule that pure expression of opinion cannot constitute fraudulent misrepresentations occurs when "the person giving the opinion has knowledge superior to that of the person relying upon the opinion, as, for example, when the facts underlying the opinion are not equally available to both parties." *Id.* at 254. In *McCollum*, the real estate appraiser "based his value assessment on his view of the property and information available to the public." *Id.* at 255. The plaintiff "had the same free access to the property and other information that [the appraiser] had." *Id.*

> One cannot by, blinding himself to facts set before him, render those who choose to look more knowledgeable. "In general, on must rely on his own judgment and investigate before entering into transactions with others.. "The law does not place a premium on negligence or unreasonable credulity. Prudence and diligence should be exercised in the execution of contracts.'"
>
> ... "If the parties have equal means of knowledge and no artifice or fraud has prevented the person to whom the representation was made from making an examination and

> forming a judgment in respect to the matter, the representation is to be regarded as a mere expression of opinion. *Statements which frequently come within this rule are those concerning value."*

Id. (emphasis in McCollum) (quoting *Guitar Trust Estate v. Boyd*, 120 S.W.2d 914, 917-18 (Tex.Civ.App--Eastland 1938, no writ)).

The fact that the *McCollum* plaintiff was a real estate broker does not distinguish *McCollum* from this case. The decision turned on equal access to pertinent information, on the plaintiff's being a broker:

> Even assuming that [the appraiser's ability to value property surpassed [the plaintiff's], the equal access each had to all pertinent information prohibits [the plaintiff] from claiming he was defrauded by [the appraiser's]opinion....[The plaintiff] could readily have formulated his own opinion as to the value of the property simply by exercising the ordinary diligence expected of a reasonable purchaser in the market place.

Id. The *McCollum* court held that because an essential element of the plaintiff's claim--the making of a fraudulent misrepresentation--had been negated, summary judgment against him was proper. *Id.* at 254-55.

Even if the plaintiffs had shown damages arising from differences in the taxes paid for the years in which the Investment Quotations were prepared, there was not "false representation of a past or existing material fact" as required by § 27.01. The tax figures in the Investment Quotations were labeled as estimates; the Quotation stated that the prices and rates were subject to change; and in addition, the plaintiffs were notified at closing by the Important Notice, which they signed, that "[a]t the beginning of next year, [their]

taxes computed on that reevaluation."

Applying the law of Texas and our deferential standard for review of jury verdicts, the facts and inferences contained in this record strongly and overwhelmingly establish that reasonable jurors could not conclude that defendants falsely represented any past or existing material fact. A jury could not reasonably find that anything more than an estimate of taxes was offered by Pulte and ICM. Furthermore, the estimates pertained only to the years in which they were prepared. No damages were sought for those years. The verdict on the § 27.01 claims must be reversed.

B.

ICM also challenges the judgment against it for gross negligence. "To sustain a cause of action for negligence it is necessary to produce evidence of a duty, a breach of that duty, proximate cause and damage." *Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984). "What lifts *ordinary* negligence into *gross* negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of exemplary damages." *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981) (emphasis in original). "In determining whether there is some evidence of the jury's finding of gross negligence, the reviewing court must look at all of the surrounding facts, circumstances, and conditions, not just individual elements or facts." *Id.*

[7] As for breach of duty, Texas law required tax appraisers, not mortgage companies to appraise at one hundred percent of market value.[10] The evidence showed that mass appraisal techniques in use at the time the Investment Quotations were prepared did not produce appraisals equal to full market value. When Harshfield prepared the tax estimates, his research indicated that the values used were not one hundred percent of market. He determined that "there was

a noncompliance with the state statute." As a matter of law and fact, there was no breach of duty by ICM.

[8-10] Furthermore, the jury's finding of causation cannot stand. There are two elements to proximate cause under Texas Law: cause in fact and foreseeability. *See Urbach v. United States*, 869 F.2d 829, 831 (5th Cir. 1989). Cause in fact is established if the injury would not have occurred "but for" the allegedly wrongful act. *In re Air Crash at Dallas/Fort Worth Airport*, 720 F.Supp. 1258, 1279 (N.D. Tex. 1989), *aff'd*, 919 F.2d 1079 (5th Cir.), *cert denied*, _____ U.S. _____, 112 S.Ct. 276, 116 L.Ed.2d 228 (1991). Foreseeability requires that the injury complained of be of such a general character as might reasonably have been anticipated from the defendant's conduct. *Id.*

[11] The tax estimates were not the cause in fact of plaintiffs' alleged damages.[11] As noted, the tax differentials alleged as damages were differentials that occurred for years subsequent to those for which the Investment Quotations were prepared. As also noted, plaintiffs did not allege injuries for the year in which the estimates were prepared. The reappraisals resulted in the higher taxes. And, plaintiffs had been put on notice that the tax information was subject to change.

ICM made clear at closing, through its Important Notice, that "at the beginning of next year, your property will be reevaluated and your taxes computed on that reevaluation." As described, plaintiffs signed that notice at closing.

Under Texas law and our deferential standard of jury verdict review, no reasonable juror could find the evidence here supported and finding of breach of duty or causation.

III.

Accordingly, we REVERSE and RENDER in favor of Pulte and ICM.

FOOTNOTES

1. Plaintiffs are Walter and Paula Allen, Jerry and Linda Anderson, Robert and Ann Bykowicz, Patrick and Janet Klem, Sid and Mary Jean McArthur,and Patrick and Terrie Rourke.

2. The statement was printed just to the right of the monthly payment data and above the name of the Pulte representative who prepared the quotation, except on one quotation where it was located below the information and to the right of the name of the Pulte representative.

3. For example, the Bykowiczes and Rourkes purchased their homes in late 1983. After the reappraisal in 1984, Harris County property increased in value from $72 to $115 billion.

4. Two couples purchased homes in Harris County; four, in Fort Bend County.

5. ICM offered plaintiffs the option of taking the shortage and extending it out as much as eighteen to twenty-four months for repayment, "to lessen the burden on the borrower."

6. As stated in the special verdict, incorporated in the final judgment, the cumulative damages awarded were: (1) tax differential–$8,940.74, (2) "out-of-pocket expenses"–$39,748.97, (3) mental anguish–$70,000, and (4) exemplary damages $1.35 million.

   Pursuant to the final judgment, compensatory damages awarded against Pulte and ICM, jointly and severally, on the first cause of action (§ 27.01 claim) were: the Allens were awarded $3,680.16, plus prejudgment interest, for actual damages (tax differential, FHA mortgage insurance and attorneys fees to have HUD take mortgage from ICM), and $10,000 plus prejudgment interest for past mental anguish; the Andersons, $1,784.59 plus prejudgment interest, for actual damages (tax differential, lost profit sharing contribution, moving expenses, costs of foreclosure and home improvements), and $10,000 plus prejudgment interest for past mental anguish; the Bykowiczes, $14,275.68, plus prejudgment interest, for actual damages (tax differential, amount lost due to depressed value at time of sale and costs associated

with prosecuting claims), and $15,000, plus prejudgment interests, for past mental anguish; the Klems, $12,262.11, plus prejudgment interest, for actual damages (tax differential, costs of sale of home, closing costs on new home moving expenses, costs of foreclosure when purchaser defaulted, and FHA mortgage insurance), and $10,000, plus prejudgment interest, for past mental anguish; the McArthurs, $12,983.35, plus prejudgment interest, for actual damages (tax differential, the difference between the amount received from tenants now occupying their home and their house payment and a possible sales commission that may be incurred in a future sale of the home), and $10,000 plus prejudgment interest, for past mental anguish; the Rourkes, $3,703.82, plus prejudgment interest, for actual damages (tax differential, costs of foreclosure and loss of home improvements through a foreclosure), and $15,000, plus prejudgment interest, for past mental anguish. The damages were the same on the second cause of action (gross negligence), but judgment was only against ICM.

7. Obviously, the award of attorneys fees is vacated.

8. The Andersons, who financed their home through a three-year adjustable rate mortgage, received an Investment Quotation that differed from the other five couples'. The Pulte sales representative filled out two sections of the form for the Andersons, estimating monthly costs for years one and three. Both years reflect identical amounts for taxes, hazard insurance, and community maintenance. The only figures that varied between year one and year three were those for principal and interest. However the Andersons' Investment Quotation, like the other plaintiffs', stated: "INFORMATION IS ESTIMATED AND BASED ON CURRENT PRICES AND INTEREST RATES, WHICH ARE SUBJECT TO CHANGE WITHOUT NOTIFICATION. TAXES AND INSURANCE ARE ESTIMATED." Needless to say, it would be impossible to predict three years out the amount needed for taxes and insurance. The Investment Quotation was "based on current prices and interest rates, which [were] subject to change" and were "estimated."

9. The date and amount of the estimated taxes were November 1984, Allens-$1680 ($140 per month); September 1984, Andersons - $2,280 ($190 per month); October 1983,

Bykowiczes-$924 ($77 per month); October 1984, Klems-$1,584 ($132 per month); March 1983, McArthurs-$1,140 ($95 per month; and September 1983, Rourkes-$972 ($81 per month).

The taxes in issue were (the year listed is the year of assessment; the tax was paid the next year): Allens-$8,600.16 ($2,228.73-1985, $2244.39-1986, $2,181.76-1987, and $1,945.28-1988); Andersons-$10,056,54 ($2,753.43-1985, $2,591.16-1986, $2,390.84-1987, and $2,3211.11-1988); Bykowiczes-$4,048.52($1,564.84-1984,$1,192.65-1985,and $1,291.03-1986); Klems-$8,377.01 ($2,144.56-1985, $2,157.230-1986, $2,094.63-1987, and $1,980.59-1988); McArthurs-$8,107.38 ($1,584.78-1984), $1,790.93-1985, $1,729.41-1986, $1,550.46-1987, $1,451.80-1988); and Rourkes-$4,119.82 ($1,371.22-1984, $1,351.60-1985, and $1,397.00-1986). As reflected in note 5, plaintiffs did not recover all of the taxes in issue.

10. Texas' Property Tax Code provides:

> The assessment of property for taxation on the basis of a percentage of its appraised value is prohibited. All property shall be assessed on the basis of 100 percent of its appraised value.
>
> V.T.C.A. Tax Code § 26.02 (1992 Supp.).

11. As noted, the total tax differential awarded plaintiffs for several years was only $8,940.74; but the damages for out-of-pocket expenses and mental anguish totalled $39,748.97 and $70,000.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT J. BYKOWICZ, et al	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	C.A. NO. H-85-4738
	§	
PULTE HOME	§	
CORPORATION, and	§	
ICM MORTGAGE	§	
CORPORATION,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

The trial of this case began on June 18, 1990. The Plaintiffs were: Walter E. and Paula J. Allen ("Mr. and Mrs. Allen"), Jerry R. and Linda G. Anderson ("Mr. and Mrs. Anderson"), Robert J. and E. Anne Bykowicz ("Mr. and Mrs. Bykowicz"), Patrick W. and Janet T. Klem ("Mr. and Mrs. Klem"), Sidney W. and Mary Jean McArthur"), and Patrick J. and Terrie L. Rourke ("Mr. and Mrs. Rourke"). The Defendants were: Pulte Home Corporation ("Pulte") and ICM Mortgage Corporation ("ICM"). On the date the trial began, the parties appeared by and through their respective attorneys-

in-charge and announced ready for trial. A jury was then selected and impanelled and the parties began the presentation of their evidence.

After the evidence was presented and both sides rested, the Court submitted this cause to the jury. On July 9, 1990, the jury returned a verdict in which they answered questions in the Special Verdict Sheet. The court's final instructions to the jury, jury questions in the Special Verdict Sheet, and the jury's answers to those questions are collectively referred to here as the "the verdict." A certified copy of the verdict[1] is attached to this Final Judgment as Exhibit "A" and is incorporated by reference.

The jury's verdict was in favor of the Plaintiffs and against Pulte only on the Plaintiffs' claims of violation of TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987). The jury's verdict was in favor of the Plaintiffs and against ICM and Plaintiffs' claims of negligence, gross negligence, violation of the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE

---

[1] Petitioners have omitted the Court's final instructions to the jury and attach only the jury questions and answers in the Special Verdict Sheet.

ANN. § 17.41 et seq. (Vernon 1987) and violation of TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987). The Plaintiffs have advised the Court that they have elected to request the entry of a final judgment in their favor and against the Defendants based on their claims under TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987) ("first cause of action") and gross negligence ("second cause of action"), with the agreement that they will, within 30 days following the exhaustion of any final appeal from this Judgment, make an election of remedy either under the first cause of action or the second cause of action. The Court agrees to grant the Plaintiffs' aforesaid request and hereby renders a final judgment on Plaintiffs' first cause of action and second cause of action as requested, with the proviso and order that Plaintiffs shall, within 30 days after the exhaustion of any final appeal from this Judgment, make an election of remedy either under the first cause of action or the second cause of action.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Allen have an recover a final judgment against Pulte and ICM, jointly and severally, on their first cause of action,

for actual damages in the amount of $3,680.16, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from May 8, 1985 to the date of this Final Judgment. int is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Allen have and recover a final judgment on their first cause of action, in the additional amount of $5,000.00 for each of them (for a total of $10,000.00) against ICM only as actual damages for their past mental anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on the amount from March 14, 1986 to the date of the Final Judgment. Finally, it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Allen have and recover and final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their first cause of action.

It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Allen have and recover a final judgment against ICM, on their second cause of action, for actual damages in the amount of $3,680.16, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from May 8, 1985 to the date of

this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Allen have and recover a final judgment on their second cause of action, in the additional amount of $5,000.00 for each of them (for the total of $10,000.00) against ICM only as actual damages for their past mental anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from March 14, 1986 to the date of Final Judgment. Finally, it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Allen have and recover a final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their second cause of action.

It is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Anderson have and recover a final judgment against Pulte and ICM, jointly and severally, on their first cause of action, for actual damages in the amount of $1,784.59, together with pre-judgment interest at the rate of 10%, compounded daily, on the amount from March 17, 1985 to the date of this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Anderson have and recover a final judgment on their first cause

of action, in the additional amount of $5,000.00 for each of them (for a total of $10,000.00) against ICM only as actual damages for their past mental anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from March 14, 1986 to the date of this Final Judgment. Finally, it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Anderson have and recover a final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their first cause of action.

It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Anderson have and recover a final judgment against ICM on their second cause of action, for actual damages in the amount of $1,249.21, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from March 17, 1985 to the date of this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Anderson have and recover a final judgment on their second cause of action, in the additional amount of $3,500.00 for each of them (for a total of $7,000.00) against ICM only as actual damages for their past mental

anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from March 14, 1986 to the date of Final Judgment. Finally, it is ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Anderson have and recover a final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their second cause of action.

It is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Bykowicz have and recover a final judgment against Pulte and ICM, jointly and severally, on their first cause of action, for actual damages in the amount of $14,275.68, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from April 4, 1984 to the date of this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Bykowicz have and recover a final judgment on their first cause of action, in the additional amount of $7,500.00 for each of them (for a total of $15,000.00) against ICM only as damages for their mental anguish, together with pre-judgment interest as the rate of 10%, compounded daily, on that amount from May 16, 1985 to the date of this Final Judgment. Finally, it is also ORDERED, ADJUDGED

and DECREED that Mr. and Mrs. Bykowicz have and recover a final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their first cause of action.

It si further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Bykowicz have and recover a final judgment against ICM, on their second cause of action, for actual damages in the amount of $14,275.68, together with pre-judgment interest at the rate of 10%, compounded daily, on the amount from April 4, 1984 to the date of this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Bykowicz have and recover a final judgment on their second cause of action, in the additional amount of $7,500.00 for each of them (for a total of $15,000.00) against ICM only as actual damages for their past mental anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from May 16, 1985 to the date of Final Judgment. Finally, it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Bykowicz have and recover a final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their second cause of action.

It is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Klem have and recover a final judgment against Pulte and ICM, jointly and severally, on their first cause of action, for actual damages in the amount of $12,262.11, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from April 4, 1985 to the date of this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Klem have and recover a final judgment on their first cause of action, in the additional amount of $5,000.00 for each of them (for a total of $10,000.00) against ICM only as actual damages for their past mental anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from March 14, 1986 to the date of this Final Judgment. Finally, it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Klem have and recover a final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their first cause of actions.

It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Klem have and recover a final judgment against ICM, on their second cause of action, for actual damages in the amount of

$12,262.11, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from April 4, 1985 to the date of this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Klem have and recover a final judgment on their second cause of action, in the additional amount of $5,000.00 for each of them (for a total of $10,000.00) against ICM only as actual damages for past mental anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from March 14, 1986 to the date of Final Judgment. Finally it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Klem have and recover a final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their second cause of action.

It is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. McArthur have and recover a final judgment against Pulte and ICM, jointly and severally, on their first cause of action, for actual damages in the amount of $12,983.35, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from September 15, 1984 to the date of this Final Judgment.

It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. McArthur have and recover a final judgment on their first cause of action, in the additional amount of $5,000.00 for each of them (for a total of $10,000.00) against ICM only as actual damages for their past mental anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from March 15, 1985 to the date of this Final Judgment. Finally, it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. McArthur have and recover a final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their first cause of action.

It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. McArthur have and recover a final judgment against ICM, on their second cause of action, for actual damages in the amount of $9,737.51, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from September 15, 1984 to the date of this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. McArthur have and recover a final judgment on their second cause of action, in the

additional amount of $3,750.00 for each of them (for a total of $7,500.00) against ICM only as a actual damages for their past mental anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from March 15, 1985 to the date of Final Judgment. Finally, it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. McArthur have and recover a final judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their second cause of action.

It is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Rourke have and recover final judgment against Pulte and ICM, jointly and severally, on their first cause of action, for actual damages in the amount of $3,703.82, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from March 28, 1984 to the date of this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Rourke have and recover a final judgment on their first cause of action, in the additional amount of $7,500.00 for each of them (for a total of $15,000.00) against ICM only as damages for their past mental anguish, together with pre-judgment interest at the rate of 10%,

compounded daily, on that amount from May 15, 1985 to that date of this Final Judgment. Finally, it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Rourke have and recover final judgment against ICM only in the amount of $225,000.00 as exemplary damages on their first cause of action.

It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Rourke have and recover a final judgment against ICM, on their second cause of action, for actual damages in the amount of $3,703.82, together with pre-judgment interest at the rate of 10%, compounded daily , on that amount from March 28, 1984 to the date of this Final Judgment. It is further ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Rourke have and recover a final judgment on their second cause of action, in the additional amount of $7,500.00 for each of them (for a total of $15,000.00) against ICM only as actual damages for their past mental anguish, together with pre-judgment interest at the rate of 10%, compounded daily, on that amount from May 15, 1985 to the date of Final Judgment. Finally, it is also ORDERED, ADJUDGED and DECREED that Mr. and Mrs. Rourke have and recover a final

judgment against ICM only in the additional amount of $225,000.00 as exemplary damages on their second cause of action.

It is also ORDERED, ADJUDGED and DECREED that Plaintiffs have and recover a final judgment against Pulte and ICM, jointly and severally, on their first cause of action, for their costs of depositions and expert witness fees in the amount of $27,057.89 pursuant to the TEX. BUS. & COM. CODE Ann. § 27.01(e) (Vernon 1987).

Because the jury's verdict determined that the Defendants violated TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987), this Court finds and concludes that the Plaintiffs are entitled to recover from the Defendants, jointly and severally, on their first cause of action, their reasonable and necessary attorney's fees as incurred in this cause in addition to the other damages provided for by this Final Judgment on their first cause of action. Therefore, it is also ORDERED, ADJUDGED and DECREED that the Plaintiffs have and recover a final judgment against Pulte and ICM, jointly and severally, on their first cause of action in the amount of $385,565.94 for reasonable and necessary attorney's fees incurred as authorized

by TEX. BUS. & COM. CODE ANN. § 27.01(e) (Vernon 1990). In the event this cause is appealed by one of the Defendants, the Court specifically and expressly reserves jurisdiction to separately determine and award reasonable and necessary attorney's fees to the Plaintiffs for any work subsequent to the entry of this Final Judgment on appeal. The separate adjudication of the amount of these post-judgment and appellate fees by this Court shall have no effect on the finality of this Final Judgment under 28 U.S.C. § 1291, whether for purposes of appeal or for purposes of enforcement and collection.

It is also ORDERED, ADJUDGED and DECREED that Plaintiffs shall recover their taxable costs, including but not limited to the costs of transcript on appeal, from Defendants as provided by 28 U.S.C. § 1920 (1989).

Finally, it is also ORDERED, ADJUDGED and DECREED that all awards of actual and exemplary damages, attorney's fees, costs and expert witness fees provided for in this Final Judgment shall accrue post-judgment interest at the maximum lawful rate as provided for by 28 U.S.C. § 1961 (1990) from the date of this Final Judgment until actually paid.

The Plaintiffs shall have all writs of execution and other process necessary to enforce this Final Judgment.

All relief requested by the Plaintiffs that is not specifically granted or provided for by this Final Judgment is DENIED.

SIGNED at Houston, Texas, this 28th day of September, 1990.

/S/ John V. Singleton, Jr.
JOHN V. SINGLETON JR.,
United States District Judge

APPROVED AS TO FORM AND
CONTENT AND ENTRY REQUESTED:

DOYLE, REED, RESTREPO,
HARVIN & ROBBINS
4700 Texas Commerce Tower
Houston, Texas 77002
(713) 228-5100

By /S/ Ronald J. Restrepo
RONALD J. RESTREPO
Federal I.D. #920
State Bar No. 16791300

KATHLEEN CYNTHIA PICKETT & ASSOCIATES
Attorneys At Law
4800 San Felipe, Suite 300
Houston, Texas 77056
(713) 961-1855

By /S/ Kathleen Cynthia Pickett
KATHLEEN CYNTHIA PICKETT
Federal I.D. #5745
State Bar No. 15980500

ATTORNEYS FOR PLAINTIFFS

SPECIAL VERDICT SHEET

1. Did Pulte engage in any false, misleading, or deceptive act or practice in providing written information to any Plaintiff couple regarding their monthly tax escrow payments, and if so was that act or practice a producing cause of damages to that couple?

Answer "Yes or "No" for each of the following:

Allens	No
Andersons	No
Bykowiczs	No
Klems	No
McArthurs	No
Rourkes	No

2. Did ICM engage in any false, misleading, or deceptive act or practice in creating the tax charts for Pulte's use in providing written information to any Plaintiff couple regarding their monthly escrow payments and if so was that act or practice a producing cause of damages to that couple?

Answer "Yes" or "No" for each of the following:

Allens	Yes
Andersons	Yes
Bykowiczs	Yes
Klems	Yes
McArthurs	Yes
Rourkes	Yes

3. Did Pulte engage in any unconscionable action or course of action toward any Plaintiff couple in providing written information regarding their monthly tax escrow payments, and if so was that act or practice a producing cause of damages to that couple?

Answer "Yes" or "No" for each of the following"

Allens	No
Andersons	No
Bykowiczs	No
Klems	No
McArthurs	No
Rourkes	No

4. Did ICM engage in any unconscionable action or course of action toward any Plaintiff couple in providing written information regarding their monthly tax escrow payments, and if so was that act or practice a producing cause of damages to that couple?

Answer "Yes" or "No" for each of the following:

Allens	Yes
Andersons	Yes
Bykowiczs	Yes
Klems	Yes
McArthurs	Yes
Rourkes	Yes

If you answer question numbers 1, 2, 3 or 4 "YES" as to any Plaintiff couple, answer question number 5 for each such couple. If all of your answers to question numbers 1, 2, 3 and 4 are "NO", skip to question number 6.

5. Did Pulte or ICM knowingly commit any of the actions which you have found in question numbers 1, 2, 3 or 4?

Answer "Yes" or "No" for each of the following Plaintiffs and as to both Defendants:

	Pulte	ICM
Allens	No	Yes
Andersons	No	Yes
Bykowiczs	No	Yes
Klems	No	Yes
McArthurs	No	Yes
Rourkes	No	Yes

6. Whose negligence do you find approximately caused the damages sustained by each Plaintiff couple?

Answer "Yes" or "No" for each person in the following six groupings:

(1)	Pulte	No
	ICM	Yes
	Allens	No
(2)	Pulte	No
	ICM	Yes
	Allens	No
(3)	Pulte	No
	ICM	Yes
	Bykowiczs	No
(4)	Pulte	No
	ICM	Yes
	Klems	No
(5)	Pulte	No
	ICM	Yes
	McArthurs	No
(6)	Pulte	No
	ICM	Yes
	Rourkes	No

If, in answer to question number 6, you found that the negligence of more than one of those named proximately caused the damages of any Plaintiff couple, then answer question number 7 for each couple where you found negligence on the part of more than one person. Otherwise, skip to question number 8.

7. What percentage of negligence do you find to be due to each party found by to be negligent in your answer to question number 6? The percentages for each grouping must total 100 percent.

(1) Pulte
ICM
Allens
TOTAL 100%

(2) Pulte
ICM 70
Allens 30
TOTAL 100%

(3) Pulte
ICM
Bykowiczs
TOTAL 100%

(4) Pulte
ICM
Klems
TOTAL 100%

(5) Pulte
ICM 75
McArthurs 25
TOTAL 100%

(6) Pulte
ICM
Rourkes
TOTAL 100%

If in answer to question number 6, you found any negligence on the part of Pulte or ICM which proximately caused damages to any Plaintiff couple, then answer question number 8 as to that couple. Otherwise, skip to question number 9.

8. Did the negligence of Pulte or ICM constitute gross negligence?

	Pulte	ICM
Allens	No	Yes
Andersons	No	Yes
Bykowiczs	No	Yes
Klems	No	Yes
McArthurs	No	Yes
Rourkes	No	Yes

If you have answered question number 8 "YES" for any Plaintiff couple as to either Pulte or ICM, answer question number 9 as to them. Otherwise, skip to question number 10.

9. Did Pulte or ICM act with malice?

Answer "Yes" or "No" for each of the following Plaintiffs and as to the Defendants:

	Pulte	ICM
Allens	No	No
Andersons	No	No
Bykowiczs	No	No
Klems	No	No
McArthurs	No	No
Rourkes	No	No

10. Did Pulte commit fraud in providing any Plaintiff couple with written information regarding their monthly tax escrow payments?

Answer "Yes" or "No" for each of the following:

Allens	Yes
Andersons	Yes
Bykowiczs	Yes
Klems	Yes
McArthurs	Yes
Rourkes	Yes

If you have answered question number 10 "YES" as to any Plaintiff couple, answer question number 11 as to them. Otherwise, skip to question number 12.

11. Did Pulte make any false written representation with actual awareness of its falsity?

Answer "Yes or "No" for each of the following:

Allens	No
Andersons	No
Bykowiczs	No
Klems	No
McArthurs	No
Rourkes	No

12. Did ICM commit fraud in the preparation of the tax charts used by Pulte in preparing the Investment Quotations?

Answer "Yes" or "No" for each of the following:

Allens	Yes
Andersons	Yes
Bykowiczs	Yes
Klems	Yes
McArthurs	Yes
Rourkes	Yes

If you have answered any of questions number 1, 2, 3 or 4 "YES" as to any Plaintiff couple, or if you have answered question number 6 "YES" as to Pulte or ICM or if you have answered questions number 10 or 12 "YES", then answer question number 13.

If you have answered questions 1, 2, 3, 4 or 6 or 10 or 12 "No," you have concluded your deliberations.

13. What amount of money, if paid now in cash would reasonably and fairly compensate the Plaintiffs for their actual damages resulting from the conduct which you have found?

Answer in dollars and cents for all of the applicable parties.

Part I - the difference between the property taxes actually paid to date and the amount of the property taxes stated in the pertinent Investment Quotation.

Allens	$1,880.16
Andersons	$ 784.59
Bykowiczs	$1,275.68
Klems	$1,389.11
McArthurs	$2,407.38
Rourkes	$1,204.82

Part II - loss of credit in the past.

Allens	$ 0
Andersons	$ 0
Bykowiczs	$ 0
Klems	$ 0
McArthurs	$ 0
Rourkes	$ 0

Part III - loss of credit that is reasonably probable to be suffered in the future.

Allens	$ 0
Andersons	$ 0
Bykowiczs	$ 0
Klems	$ 0
McArthurs	$ 0
Rourkes	$ 0

Part IV - out-of-pocket expenses.

Allens	$ 1,000.00
Andersons	$ 1,000.00
Bykowiczs	$13,000.00
Klems	$10,000.00
McArthurs	$10,575.97
Rourkes	$ 2,500.00

If you have answered any of questions number 3, 4, 5, 8, 11 or 12 "YES" as to any Plaintiff couple, and in that event only, answer the following as to them:

14. What amount of money if paid now in cash would reasonably and fairly compensate the Plaintiffs for their mental anguish?

	Past Mental Anguish	Future Mental Anguish
Ed Allen	$5,000	$ 0
Paula Allen	$5,000	$ 0
Jerry Anderson	$5,000	$ 0
Linda Anderson	$5,000	$ 0
Bob Bykowicz	$7,500	$ 0
Anne Bykowicz	$7,500	$ 0
Pat Klem	$5,000	$ 0
Janet Klem	$5,000	$ 0
Sid McArthur	$5,000	$ 0
Mary Jean McArthur	$5,000	$ 0
Pat Rourke	$7,500	$ 0
Terrie Rourke	$7,500	$ 0

If you have answered question number 5 "YES" as to any Plaintiff couple in the Pulte column, answer the following question as to them.

15. What sum of money do you find should be awarded against Pulte as additional damages:

Answer:

Allens	$ 0
Andersons	$ 0
Bykowiczs	$ 0
Klems	$ 0
McArthurs	$ 0
Rourkes	$ 0

If you have answered question number 5 "YES" ans to any Plaintiff couple in the ICM column, answer the following question as to them:

16. What sum of money do you find should be awarded against ICM as additional damages?

Answer:

Allens	$25,000.00
Andersons	$25,000.00
Bykowiczs	$25,000.00
Klems	$25,000.00
McArthurs	$25,000.00
Rourkes	$25,000.00

If you have answered question number 8 "YES" as to any Plaintiff couple in the Pulte column or if you have answered question number 11 "YES" as to any Plaintiff couple, answer the following questions as to them:

17. What sum of money do you find should be awarded to the Plaintiff couple as exemplary damages from Pulte?

Answer in dollars and cents, if any:

Allens	$ 0
Andersons	$ 0
Bykowiczs	$ 0
Klems	$ 0
McArthurs	$ 0
Rourkes	$ 0

If you have answered question number 8 "YES" as to any Plaintiff couple in the ICM column or if you have answered question number 12 "YES" as to any Plaintiff couple, answer the following question as to them.

18. What sum of money do you find should be awarded to the Plaintiff couple as exemplary damages for ICM?

Answer in dollars and cents, if any:

Allens	$225,000.00
Andersons	$225,000.00
Bykowiczs	$225,000.00
Klems	$225,000.00
McArthurs	$225,000.00
Rourkes	$225,000.00

Rosemary FitzGerald
Chairperson

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-2923

ROBERT J. BYKOWICZ, ET AL.,

Plaintiffs-Appellees,

versus

PULTE HOME CORPORATION, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion January 6, 5 Cir., 1992, _____F.2d_____)

(February 27, 1992)

Before CLARK, Chief Judge, WILLIAMS and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing instrument was forwarded by U.S. first class mail, postage prepaid to the following counsel:

William T. Little
Gilpin, Paxson & Bersch
2300 First Interstate Tower
1300 Post Oak Blvd.
Houston, Texas 77056

J. Eugene Clements
Porter & Clements
700 Louisiana, Suite 3500
Houston, Texas 77002

Ronald J. Restrepo

pult.1\writ.cer

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

No. 91-1910

In The

Supreme Court of the United States

October Term, 1992

ROBERT J. BYKOWICZ, E. ANNE BYKOWICZ, PATRICK J. ROURKE, TERRY L. ROURKE, WALTER E. ALLEN, PAULA J. ALLEN, JERRY R. ANDERSON, LINDA G. ANDERSON, PATRICK W. KLEM, JANET T. KLEM, SIDNEY W. McARTHUR, and MARY JEAN McARTHUR,

Petitioners,

vs.

ICM MORTGAGE CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:

PORTER & CLEMENTS, L.L.P.
MICHAEL D. KIRBY
700 Louisiana, Suite 3500
Houston, Texas 77002

GILPIN, PAXSON & BERSCH
WILLIAM T. LITTLE
2300 First Interstate Tower
1300 Post Oak Boulevard
Houston, Texas 77056-3010

J. EUGENE CLEMENTS
700 Louisiana
Suite 3500
Houston, Texas 77002
(713) 226-0600
(713) 228-1331 - Telecopier

Counsel of Record for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals correctly held that ICM was entitled to judgment as a matter of law on Petitioners' gross negligence claim.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

FOREWORD ix

STATUTES INVOLVED 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF THE CASE 3

I. Course of Proceedings and Disposition in the Courts Below 3

II. Statement of Facts 5

REASONS FOR DENYING THE WRIT 8

I. The Standard of Review Enunciated in *Boeing Co. v. Shipman* and Utilized by the Fifth Circuit is Correct and Does Not Conflict With Any Firmly Established Position of Any Other Court of Appeals 9

A. Eighth Circuit 10

B. First Circuit 11

C. Position of the other circuits 12

II. Petitioners Have Either Waived or Invited Error as to Any Claim That the Fifth Circuit's use of the *Boeing Co. v. Shipman* Standard of Review is Either Unconstitutional or in Conflict With the Decisions of Other Courts of Appeals 15

TABLE OF CONTENTS – Continued

Page

III. The Decision Below is Consistent With the Decisions of This Court and Does Not Directly Conflict With Any Applicable Decision of This Court 16

A. The *Boeing* standard is consistent with this Court's recent holding in *Anderson v. Liberty Lobby* 16

B. This Court's decision in *Wilkerson v. McCarthy* has no application in the current context and creates no conflict with *Boeing* 18

C. Other Supreme Court authority cited by Petitioners creates no conflict 19

1. *Hepburn v. Dubois* 20

2. *Gunning v. Cooley* and *Corinne Mill, Canal & Stock Co. v. Toponce* 21

3. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.* 22

IV. The Fifth Circuit's Ruling Does Not Result in a Violation of Petitioners' Seventh Amendment Rights 23

V. Petitioners' Asserted Error Applies to Only One of the Three Grounds Upon Which the Fifth Circuit Granted ICM Judgment as a Matter of Law and the Other Grounds are a Sufficient Basis for Upholding the Judgment 25

A. The Court of Appeals' finding that no duty was breached as a matter of law was not based upon Harshfield's testimony 25

TABLE OF CONTENTS – Continued

Page

B. The Fifth Circuit's finding of no cause in fact as a matter of law was not based upon Harshfield's testimony 27

C. The Fifth Circuit's implicit finding of no foreseeability as a matter of law was not based on the testimony of Harshfield 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 16, 17, 18, 23

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962) 19, 22, 23

Black v. Stephens, 662 F.2d 181 (3rd Cir. 1981) 13

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) *passim*

Boutros v. Riggs Nat'l Bank, 655 F.2d 1257 (D.C. Cir. 1981) 12

Capella v. Zurich General Acc. Liability Ins. Co., 194 F.2d 558 (5th Cir. 1952) 15

Chicago, Rock Island & P.R.R. v. Melcher, 333 F.2d 996 (8th Cir. 1964) 19

Colgrove v. Battin, 413 U.S. 149 (1973) 23

Connell v. Sears, Roebuck & Co., 722 F.2d 1542 (Fed. Cir. 1983) 14

Corinne Mill, Canal & Stock Co. v. Toponce, 152 U.S. 405 (1894) 19, 21

Dace v. ACF Industries, 722 F.2d 374 (8th Cir. 1983), *on rehearing*, 728 F.2d 976 (8th Cir. 1984) 10

Doe by Doe v. B.P.S. Guard Services, 945 F.2d 1422 (8th Cir. 1991) 11

Downie v. Abex Corp., 741 F.2d 1235 (10th Cir. 1984) 14

Galloway v. United States, 319 U.S. 372 (1943) 23, 24

Granberry v. O'Barr, 866 F.2d 112 (5th Cir. 1988) 4

Grooms v. Minute-Maid, 267 F.2d 541 (4th Cir. 1959) 13

TABLE OF AUTHORITIES – Continued

Page

Gunning v. Cooley, 281 U.S. 90 (1930).....19, 21

H.L. Moore Drug Exch. v. Eli Lilly & Co., 662 F.2d 935 (2nd Cir. 1981), *cert. denied*, 459 U.S. 880 (1982).....13

Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).....10

Hepburn v. Dubois, 37 U.S. 743 (1838).....19, 20

Hughes v. Conticarriers & Terminals, Inc., 753 F. Supp. 221 (N.D. Ill. 1990).....13

Lavender v. Kurn, 327 U.S. 645 (1946).....19

Law v. United States, 266 U.S. 494 (1925).....15

Layne v. Vinzant, 657 F.2d 468 (1st Cir. 1981).....12

Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982).....13

Masson v. New Yorker Magazine, Inc., ___ U.S. ___, 111 S.Ct. 2419 (1991).....17, 18

Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940).....24

Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978).....13

Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).....23, 24

Neff v. Kehoe, 708 F.2d 639 (11th Cir. 1983).....14

Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205 (3rd Cir. 1970).....13

Nunes v. Bishop Aviation, Inc., 703 F. Supp. 774 (W.D. Ark. 1988).....13

Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).....13

TABLE OF AUTHORITIES – Continued

Page

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 23

Picker Int'l v. Parten, 935 F.2d 257 (11th Cir. 1991) 14

Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869 (5th Cir. 1967) 19

Robertson Oil Co. v. Phillips Petroleum Co., 871 F.2d 1368 (8th Cir. 1989) 11

Rogers v. Missouri P.R.R., 352 U.S. 500 (1957) 19

Schwimmer v. Sony Corp. of Am., 459 U.S. 1007 (1983) 14

Schwimmer v. Sony Corp. of Am., 677 F.2d 946 (2nd Cir. 1982) 13, 16

Thigpen v. Locke, 363 S.W.2d 247 (Tex. 1962) 29

United California Bank v. THC Fin. Corp., 557 F.2d 1351 (9th Cir. 1977) 14

United States v. Baytank (Houston), Inc., 934 F.2d 599 (5th Cir. 1991) 15

Western Co. of North Am. v. United States, 699 F.2d 264 (5th Cir.), *cert. denied*, 464 U.S. 892 (1983) 4

Whitsell v. Alexander, 229 F.2d 47 (7th Cir. 1956) 23

Wilkerson v. McCarthy, 336 U.S. 53 (1949) 18, 19

Wilkins v. Hogan, 425 F.2d 1022 (10th Cir. 1970) 14

RULES

FED. R. CIV. P. 50 .... 1, 17, 24

FED. R. CIV. P. 56(c) 16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

28 U.S.C. § 1332(a)(1) (1966) 3

45 U.S.C. §§ 51-60 (1986) 18

TEX. BUS. & COM. CODE ANN. § 17.41 *et seq*..... 3

TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987) . . .3, 4

TEX. TAX CODE ANN. § 26.02 (Vernon 1982)..... 26

FOREWORD

Citations to materials in the district court record on appeal are denoted by the notation "R." and the volume and page number in the district court record where the cited material appears. Citations to material in the trial transcript are denoted by the notation "Tr." and the volume and page number where the cited material appears. Citations to the transcripts of post-trial hearings are to the record volume and the page number of that particular transcript.

No. 91-1910

In The

Supreme Court of the United States

October Term, 1992

ROBERT J. BYKOWICZ, E. ANNE BYKOWICZ, PATRICK J. ROURKE, TERRY L. ROURKE, WALTER E. ALLEN, PAULA J. ALLEN, JERRY R. ANDERSON, LINDA G. ANDERSON, PATRICK W. KLEM, JANET T. KLEM, SIDNEY W. McARTHUR, and MARY JEAN McARTHUR,

Petitioners,

vs.

ICM MORTGAGE CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

In addition to the constitutional provision cited by Petitioners, this case also involves FED. R. CIV. P. 50.

SUMMARY OF THE ARGUMENT

There is no reason to grant writ of certiorari to review the Court of Appeals' faithful application of settled precedent in the context of this case.

1. The standard of review enunciated in *Boeing Co. v. Shipman* and utilized by the Fifth Circuit is correct and does not conflict with any firmly established position of any other Court of Appeals.

2. Petitioners have either waived or invited error as to any claim that the Fifth Circuit's use of the *Boeing Co. v. Shipman* standard of review is either unconstitutional or in conflict with the decisions of other Courts of Appeals.

3. The decision below is consistent with decisions of this Court and does not directly conflict with any applicable decision of this Court.

4. The Fifth Circuit's ruling does not result in a violation of the Petitioners' Seventh Amendment rights.

5. Petitioners' asserted error applies to only one of the three grounds upon which the Fifth Circuit granted ICM judgment as a matter of law and the other grounds are a sufficient basis for upholding the judgment.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Courts Below.

The Plaintiffs are six couples who purchased homes in the Houston area from Pulte Home Corporation ("Pulte") and financed those homes through ICM Mortgage Corporation ("ICM"), a Pulte subsidiary. Plaintiffs originally brought this action against Pulte and ICM on their own behalf and purporting to act on behalf of a class of individuals similarly situated, asserting violations of Texas Business & Commerce Code, § 27.01 ("statutory fraud"), TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987), the Texas Deceptive Trade Practices-Consumer Protection Act (the "DTPA"), TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (Vernon 1987), and common law theories of negligence and gross negligence.[1] Each of these claims was based on Pulte's inclusion of a current year property tax estimate in a marketing document entitled "Investment Quotation." *See* Pretrial Order, R. at 5:2435-36. Plaintiffs sought actual and punitive damages or alternatively, rescission of their home purchase contracts. *See* Third Amended Complaint, R. at 6:1937-59.

The District Court denied without review Defendants' Motions for Directed Verdict, Judgment Notwithstanding the Verdict, and New Trial, and based on the jury's findings, entered Judgment for the Plaintiffs

---

[1] The case was initially filed in Texas state district court. Pulte and ICM removed the case under 28 U.S.C. § 1332(a)(1) (1966) to the United States District Court for the Southern District of Texas, Houston Division. R. at 16:148.

against Pulte under § 27.01 and against ICM alternatively under § 27.01 and/or for gross negligence. Appendix B to Petitioners' Writ of Certiorari ("Petitioners' Appendix B"). *See also* Tr. at 7:4; 10:9. The judgment included damages for the difference between the property taxes actually paid to time of trial and the amounts described in the Investment Quotations (multiplied by the number of years to trial), out-of-pocket expenses, mental anguish, and punitive damages.[2] Petitioners' Appendix B at 3-14. After post-trial hearings, the District Court awarded attorneys' fees of $385,565.94, including substantial sums for work on Plaintiffs' unsuccessful class certification effort. Petitioners' Appendix B at 14. *See generally* R. at 35:7-17.

The Court of Appeals held that, as a matter of law, the tax estimates found in Petitioners' Investment Quotations were not actionable representations of fact under § 27.01 and that ICM was entitled to judgment as a matter of law on the gross negligence claim because there was no breach of duty, no cause in fact of damages and implicitly no foreseeability of injury, as a matter of law. The Court of Appeals based its decision on its prior examinations of the standard of appellate review of jury findings in *Granberry v. O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988), and *Western Co. of North Am. v. United States*, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 464 U.S. 892 (1983).

---

[2] The jury's cumulative findings were as follows: (1) Tax Differential – $8,940.74, (2) Out-of-Pocket – $39,767.97, (3) Mental Anguish – $70,000, and (4) Exemplary Damages – $1.35 million. Petitioners' Appendix B at 3-14.

II. Statement of Facts.

This case involves the claims of six couples who purchased homes from Pulte and who financed those homes through ICM in 1983 and 1984. *See* Admissions of Fact, Pretrial Order, R. at 5:2440-4. Early in each Plaintiff's dealings with Pulte, upon their expression of interest in a particular home, Pulte personnel prepared a one-page form entitled "Investment Quotation" which contained information about the price of the home being considered and estimates of the monthly escrow payments on items including insurance, maintenance and likely current year taxes for that home. Tr. at 4:16-17; 7:36-37. *See also* Plaintiffs' Exhs. 12, 15, 19, 23, 26, 28. The tax estimate in each Investment Quotation is the sole purported basis of all of the Plaintiffs' claims. Conspicuously noted on each Investment Quotation a few inches from the "Taxes" entry is this disclosure:

> INFORMATION IS ESTIMATED AND BASED ON CURRENT PRICES AND INTEREST RATES, WHICH ARE SUBJECT TO CHANGE WITHOUT NOTICE. TAXES AND INSURANCE ARE ESTIMATED.

Plaintiffs' Exhs. 12, 15, 19, 23, 26, 28. The Investment Quotations ("IQ's") were not part of any agreement or contract, but were used as a marketing device to outline possible housing costs for the year of purchase. Subsequently, each Plaintiff entered into a separate purchase contract with Pulte. Tr. at 8:18-29.

The amounts included in the "Taxes" blank on each IQ were drawn from charts prepared and used by ICM to calculate tax escrows for its mortgage accounts. These

tables were prepared either by the Federal Housing Administration ("FHA") or Stephen G. Harshfield ("Harshfield"), who at the time was an officer of ICM. Tr. at 7:37-39, 42.[3]

Harshfield prepared the tables from which the tax estimates were taken by comparing FHA tables and actual appraisal data on similar properties. Tr. at 7:50-51, 54-57, 59-63. Applying this information to his determination of the probable appraised value of the properties in question, Harshfield estimated then current taxes for homes with various purchase prices in various Pulte neighborhoods. Tr. at 7:53-54. *See* Tables, Plaintiffs' Exhibit 1. These figures were used by ICM for loan qualification purposes and to estimate the escrow amounts necessary to pay property taxes on homes financed by ICM. Tr. at 7:47, 66. As a convenience to Pulte, these estimates were also communicated to Pulte personnel who used them in the IQ's. Tr. at 7:50.

Each Plaintiff couple elected to finance their Pulte home through ICM. *See* Admissions, R. at 5:2441. Plaintiffs were free to arrange financing with any other company. Tr. at 7:32-33. The first contact between ICM and the Plaintiffs came during the financing negotiations. At closing, ICM gave each Plaintiff couple a document regarding "future property taxes" and their monthly tax escrow

---

[3] The tax estimates for the McArthurs, the Bykowiczes, and the Rourkes were taken from charts prepared by the FHA, and communicated to Pulte by ICM. The Allens', the Klems', and the Andersons' IQ's included tax estimates based upon Harshfield's updating of the FHA charts. *See* Plaintiffs' Exhibit 1.

payments. Defendants' Exhs. 6, 25, 35, 58, 73, 84. *See* Tr. at 2:217; 4:141-43, 186-87; 5:40, 132-36; 6:56, 69-70, 96-97, 144-45, 153-55. This document is entitled "*ICM IMPORTANT NOTICE CONCERNING FUTURE PROPERTY TAXES AND MAINTENANCE FEES*" (the "Important Notice") (emphasis in original). Each Plaintiff received and signed a copy of the "Important Notice" at closing acknowledging his or her receipt of this document. It provides in relevant part:

> Your monthly payment reflects a deposit in your escrow account on the basis of *estimated* improved property taxes. At the beginning of next year, your property will be reevaluated and your taxes computed on that reevaluation. Your monthly payments for . . . [next year] may or may not reflect a tax increase based on that reevaluation.

Defendants' Exhs. 6, 25, 35, 58, 73, 84 (emphasis added). There is no dispute that all of the Plaintiffs received this document at closing, nor is there any dispute about its contents or the authenticity of the Plaintiffs' signatures affixed thereto. No Plaintiff challenged the statements in their Important Notice at the time of closing.

There was no evidence at trial that the amounts escrowed or the amounts identified on the IQ's were insufficient to meet the tax burden on each home in the year of purchase. However, at least one year following the purchase of each home, consistent with the Important Notice, each family received notification from ICM that

the prior year's tax escrows[4] were insufficient to fully pay property taxes incurred that year. *See, e.g.*, Tr. at 4:84, 85-86. *See also* Plaintiffs' Exhs. 13, 16, 20, 24, 27, 29. ICM, having paid the property taxes in full, permitted the Plaintiffs to repay ICM over a period of time of up to two years. *Id.* In addition, in order to prevent future shortages, ICM increased the regular monthly escrow payments accordingly. *Id.* Plaintiffs' objections to these changes initiated the dispute which led to this lawsuit.

REASONS FOR DENYING THE WRIT

Respondent ICM Mortgage Corporation respectfully opposes the Petition for Writ of Certiorari in this case because: 1) the ruling of the Court of Appeals on the narrow issue involved in this case is correct based upon proper review standards and does not create any true conflict among the circuits or conflict with any applicable authority from this Court, and 2) the points asserted by Petitioners ignore independently dispositive portions of the Court of Appeals' decision.

[4] For those who purchased their homes in 1983, notices were received in 1985 regarding amounts escrowed for 1984 taxes. For those who purchased their homes in 1984, notices were received in 1986 regarding amounts escrowed for 1985 taxes.

I. The Standard of Review Enunciated in *Boeing Co. v. Shipman* and Utilized by the Fifth Circuit is Correct and Does Not Conflict With Any Firmly Established Position of Any Other Court of Appeals.

Petitioners assert that the court erred by applying the following standard of review enunciated in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75. Petitioners contend that because the Fifth Circuit standard of review permits the Court to examine all the evidence, even with all inferences and conflicts resolved in favor of the non-movant, there is a resulting conflict among the courts of appeals. However, a review of the authorities cited in support of such a conflict reveals that there is no meaningful conflict worthy of review by certiorari. *Boeing* is clearly the majority rule[5] and may very well be the unanimous standard.

A. Eighth Circuit.

The principal decision relied upon by Petitioners is *Dace v. ACF Industries*, 722 F.2d 374 (8th Cir. 1983), *on rehearing*, 728 F.2d 976 (8th Cir. 1984). Incredibly, Petitioners never once acknowledge the existence of the subsequent opinion on rehearing. This is particularly remarkable because in that second opinion the Eighth Circuit acknowledges that in a prior matter: "[W]e *did* consider evidence provided by employees of the defendant in deciding to affirm a directed verdict granted by the District Court." *Dace*, 728 F.2d at 977 (emphasis added) (citing *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983)). The *Dace* Court went on to note that the issue was such that en banc review by the entire Eighth Circuit might be appropriate, but refused to order such review. *Dace*, 728 F.2d at 978. This issue has never been resolved by Eighth Circuit en banc review. *Dace* created a conflict within the Eighth Circuit, not a conflict between circuits.

---

[5] *See infra* pp. 12-14.

Further, an examination of recent Eighth Circuit authority reveals that the standard enunciated in *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368, 1371 (8th Cir. 1989), is now the controlling view. There it was noted that reversal of a jury verdict was appropriate if:

> [a]ll of the evidence points one way and is susceptible of no reasonable inferences sustaining the position of [plaintiffs]. Furthermore, we must *resolve direct factual conflicts* in favor of [plaintiffs], assume as true all facts in [plaintiffs'] favor which the evidence tends to prove, and give [plaintiffs] the benefit of all reasonable inferences.

Id. (citations omitted) (emphasis added). *See also Doe by Doe v. B.P.S. Guard Services*, 945 F.2d 1422 (8th Cir. 1991). Clearly if the court must "resolve direct factual conflicts" it is reviewing all the evidence, otherwise there is no need to address how conflicts are to be treated. At most there is a conflict within the decisions of the Eighth Circuit which that court must itself resolve. However, one could also easily interpret *Robertson Oil* and its progeny as the Eighth Circuit's current adherence to the majority view.

B. First Circuit.

Petitioners also assert that the First Circuit Court of Appeals has adopted a standard inconsistent with *Boeing* resulting in a conflict to be resolved by this Court. Again, a closer examination of First Circuit precedent reveals no meaningful conflict at all. The First Circuit, and on rare occasions other circuit courts, apply the reasonable juror

standard in a slightly more stringent manner by considering evidence of the non-movant and uncontradicted and unimpeached testimony of all other disinterested witnesses. *See Layne v. Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981). This alleged conflict is, in effect, an application of the principle that all inferences are to be drawn in favor of the verdict. It does not reflect any meaningful distinction from the *Boeing* standard, and given that Harshfield was no longer employed by the defendants below and was not himself a defendant, his testimony could very well fall within the First Circuit's permissible scope of review. Further, it can hardly be disputed that the Petitioners' IQ's and Important Notices would be properly considered under the First Circuit's standard. Given that the Fifth Circuit based its ruling on these uncontested documents, any potential conflict with *Boeing* is of no consequence in the present case.

C. Position of the other circuits.

The *Boeing* standard or a similar one has been adopted by and/or cited authoritatively by either the Courts of Appeals or district courts of virtually every other circuit.[6]

---

[6] The following cases either adopt *Boeing* specifically or implicitly follow a "review all of the evidence" standard:

Court of Appeals for the District of Columbia

Boutros v. Riggs Nat'l Bank, 655 F.2d 1257 (D.C. Cir. 1981)

(Continued on following page)

In further support of their claim of a conflict, Petitioners rely upon Justice White's dissent to the denial of

---

(Continued from previous page)

Second Circuit Court of Appeals

Schwimmer v. Sony Corp. of Am., 677 F.2d 946, 952 (2nd Cir.) *cert. denied*, 459 U.S. 1007 (1982); *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 940-41 (2nd Cir. 1981), *cert. denied*, 459 U.S. 880 (1982).

Third Circuit Court of Appeals

Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205, 1212 n. 7 (3rd Cir. 1970). *See also Black v. Stephens*, 662 F.2d 181, 187 (3rd Cir. 1981) (calling for courts to "review the record").

Fourth Circuit Court of Appeals

Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242-43 (4th Cir. 1982); *Grooms v. Minute-Maid*, 267 F.2d 541, 543 (4th Cir. 1959).

Sixth Circuit Court of Appeals

Morelock v. NCR Corp., 586 F.2d 1096, 1104-05 (6th Cir. 1978) (acknowledging that the court should consider "the evidence").

Seventh Circuit Court of Appeals

Panter v. Marshall Field & Co., 646 F.2d 271, 281 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981). *See also Hughes v. Conticarriers & Terminals, Inc.*, 753 F. Supp. 221, 223 (N.D. Ill. 1990).

Eighth Circuit District Court (W.D. Arkansas)

Nunes v. Bishop Aviation, Inc., 703 F. Supp. 774, 776 (W.D. Ark. 1988).

(Continued on following page)

certiorari in *Schwimmer v. Sony Corp. of Am.*, 459 U.S. 1007, 1008-09 (1983) (White, J., dissenting). At that time, Justice White noted what he perceived to be a conflict among the Courts of Appeals regarding the standard of review of a jury verdict, or order removing a matter from the jury. However, as demonstrated previously, the *Boeing* standard has either tacitly or specifically been adopted by virtually every Court of Appeals. In addition, the fact that those Courts of Appeals did not re-examine the issues reviewed and discussed at length in *Boeing* does not, as asserted by Petitioners, reflect a failure to examine the issue, but rather evidences an acceptance of the well-reasoned discussion by the Fifth Circuit.

(Continued from previous page)

Ninth Circuit Court of Appeals

United California Bank v. THC Fin. Corp., 557 F.2d 1351, 1356 (9th Cir. 1977).

Tenth Circuit Court of Appeals

Downie v. Abex Corp., 741 F.2d 1235, 1238 (10th Cir. 1984); *Wilkins v. Hogan*, 425 F.2d 1022, 1024 (10th Cir. 1970).

Eleventh Circuit Court of Appeals

Picker Int'l v. Parten, 935 F.2d 257, 260 (11th Cir. 1991); *Neff v. Kehoe*, 708 F.2d 639, 641-42 (11th Cir. 1983).

Federal Circuit Court of Appeals

Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1546 (Fed. Cir. 1983).

II. Petitioners Have Either Waived or Invited Error as to Any Claim That the Fifth Circuit's use of the *Boeing Co. v. Shipman* Standard of Review is Either Unconstitutional or in Conflict With the Decisions of Other Courts of Appeals.

Remarkably, the precise standard set out in *Boeing Co. v. Shipman* was the one requested by the Petitioners in their original Reply Brief in the Court of Appeals and the standard again reasserted in their Motion For Rehearing. The relevant portions of these prior pleadings by Petitioners are included herein as Appendices A and B. Until now, Petitioners have taken the position that, "[i]n reviewing the evidence to apply this standard, *the Court must consider all the evidence* and draw all reasonable conclusions and inferences in favor of the Appellees. . . ." Brief of Appellees, p. 25 (Appendix A) (emphasis added). After the issuance of the Fifth Circuit's opinion, Petitioners asserted for the first time that "[t]he Court [of Appeals] also contradicts established principles in applying these standards by failing to consider *all* of the evidence or to do so in the light and with all reasonable inferences most favorable to [the Homeowners]." Petition for Rehearing, p. 4 (Appendix B) (citing *Boeing*, 411 F.2d at 374).

The record is thus clear that Petitioners demanded that the Court of Appeals apply the *Boeing* standard. They cannot now be heard to complain because the application of the standard they requested doomed their claims. *See Law v. United States*, 266 U.S. 494, 496 (1925); *Capella v. Zurich General Acc. Liability Ins. Co.*, 194 F.2d 558, 560 (5th Cir. 1952). *See also United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606 (5th Cir. 1991). Given

Petitioners' prior inconsistent position, their assertion at this late date that the very standard they argued for is in conflict with the decisions of other circuits, this Court, and the Seventh Amendment should not be considered. The Petition should be denied.

III. The Decision Below is Consistent With the Decisions of This Court and Does Not Directly Conflict With Any Applicable Decision of This Court.

Petitioners argue that the decision of the Court of Appeals, and indeed the entire *Boeing* standard of review, is in fatal conflict with prior decisions of this Court. They are simply wrong.

A. The *Boeing* standard is consistent with this Court's recent holding in *Anderson v. Liberty Lobby*.

While Petitioners make much of older authority from this Court, the vast majority of which is taken out of context, Petitioners ignore the impact of this Court's more recent holding in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).[7] In *Liberty Lobby* this Court recognized that the standard of review in summary judgment cases under FED. R. CIV. P. 56(c) "mirrors the standard for directed

---

[7] It should be noted that Justice White's dissent to the denial of certiorari in *Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946, 952 (2nd Cir.), *cert. denied*, 459 U.S. 1007 (1982), predates and thus does not consider the impact of this decision. Further, Justice White does not assert a conflict with Supreme Court precedent in his analysis.

verdict" under FED. R. CIV. P. 50(a), "which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Liberty Lobby*, 477 U.S. at 250. This Court went on to note that the inquiry in either summary judgment or directed verdict "is the same: whether *the evidence* presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52 (emphasis added). Clearly this Court contemplated in this statement of the rule that *all* of the evidence must be reviewed. Otherwise there is no way to determine if a "sufficient disagreement" exists or if the evidence is "one-sided." Petitioners' assertion that only the non-movant's proof is to be considered in this analysis is inconsistent with this Court's enunciated standard for *both* summary judgment and judgments as a matter of law.

The *Boeing* standard of review however, is wholly consistent with *Liberty Lobby* and its progeny and the dictates of Rule 50(a). It is Petitioners' proposed standard that is not. Indeed, in one of the more recent cases cited by Petitioners, it is clear this Court did review all the evidence when addressing the propriety of summary judgment. *See Masson v. New Yorker Magazine, Inc.*, ___ U.S. ___, 111 S. Ct. 2419, 2435-37 (1991).[8] The portion of that

---

[8] *Masson* involved a libel action where conversations between the Plaintiff and a reporter had partially, but not completely, been tape recorded. Published statements differed in some respects from the tapes and the plaintiff asserted these alterations were malicious and false. 111 S. Ct. at 2424-28.

opinion relied upon by Petitioners deals solely with the indisputable concept that where there is directly conflicting evidence in the judgment, as a matter of law conflicts will be resolved in favor of the non-movant. *Id.* at 2435-37. This does not mean that the Court must ignore all evidence proffered by the movant.[9] That is not the holding of *Masson* and would be inconsistent with *Liberty Lobby*. Indeed, were this Court to have followed Petitioners' proposed standard when deciding *Masson*, it could not have reviewed the audiotapes in question because Masson testified he never made the statements attributed to him. Under Petitioners' proposed standard no other evidence could be considered, clearly leading to a ridiculous result.

B. This Court's decision in *Wilkerson v. McCarthy* has no application in the current context and creates no conflict with *Boeing*.

Petitioners cite *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), more than any other decision because it is the purported basis of the *Dace* decision distinguished previously, *supra* at 10. *Wilkerson* is, however, the easiest authority to distinguish because it deals with a claim under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1986).

As noted in *Boeing*, in FELA cases federal courts are prohibited from overturning jury verdicts unless "there is

---

[9] The evidence rejected by this Court in *Masson* consisted of purported notes of conversations as to which authenticity was disputed. *Masson*, 111 S. Ct. at 2428.

a *complete absence* of probative facts to support the conclusion reached." 411 F.2d at 370 (quoting *Planters Mfg. Co. v. Protection Mut. Ins. Co.*, 380 F.2d 869, 874 (5th Cir. 1967)). *Planters* was based on this Court's holding in *Lavender v. Kurn*, 327 U.S. 645 (1946), an FELA case recognizing what has since been called the "slight negligence" standard. *See Rogers v. Missouri P.R.R.*, 352 U.S. 500, 506 (1957). As noted by the Eighth Circuit, in FELA cases, unlike the case at bar, "the jury's power to engage in inferences must be recognized as being significantly broader than in common law negligence actions." *Chicago, Rock Island & P.R.R. v. Melcher*, 333 F.2d 996, 999-1000 (8th Cir. 1964). Stated simply, the FELA "scintilla of evidence" rule enunciated in *Wilkerson* has no application outside of that statute and its companion statute, the Jones Act. Petitioners' attempt to attack *Boeing* by reference to *Wilkerson* cannot withstand reasoned review.

C. Other Supreme Court authority cited by Petitioners creates no conflict.

The remaining authorities cited by Petitioners which they assert mandate reversal of *Boeing* are equally innocuous, and largely antique.[10] A review of these cases reveals that Petitioners have either grossly misrepresented those holdings to this Court or failed to recognize

---

[10] Petitioners note these principal cases: *Hepburn v. Dubois*, 37 U.S. 743 (1838); *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U.S. 405 (1894); *Gunning v. Cooley*, 281 U.S. 90 (1930); *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949); and *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), which purport to require the overturning of *Boeing*.

the clear factual and legal distinctions that exist between those cases and the case at bar.

1. *Hepburn v. Dubois.*

Petitioners assert that *Hepburn* renders the Fifth Circuit's consideration of Harshfield's testimony erroneous. In fact, Petitioners take one brief passage from this Court's 1838 opinion completely out of context. In *Hepburn*, this Court was reviewing a jury verdict in favor of the plaintiff seeking to quiet title in her favor to a tract of land. 37 U.S. at 345-47.

This Court reviewed the sufficiency of the evidence, stating that:

> [A]fter a verdict in favor of either party on the evidence, he has a right to demand of a court of error that they look to the evidence only for one purpose, with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case.

Id. at 376. In other words, this Court recognized that the appellate court must look to the entire evidentiary record for the purpose of determining whether the evidence is insufficient as a matter of law to support the jury's findings.

Hepburn goes on to note that once the Court concludes that the evidence is sufficient, the court must then base its judgment on the facts legally inferable from the evidence supporting the jury verdict. *Id.* Petitioners quote this second portion of the *Hepburn* decision, ignoring the

fact that this Court earlier implicitly recognized that the initial evidentiary review includes the entire record.

2. *Gunning v. Cooley* and *Corinne Mill, Canal & Stock Co. v. Toponce*.

It is intriguing that Petitioners discuss *Corinne Mill* (1894) simultaneously with *Gunning* (1930), a case decided thirty-five years later, and thus presumably somewhat more persuasive. In *Gunning*, this Court upheld a Court of Appeals decision that the evidence was sufficient to support a jury finding of negligence. 281 U.S. at 97-98. Initially, this Court noted that in order to be sustained, a jury verdict must be supported by more than a mere scintilla of evidence. 281 U.S. at 94. Then Justice Butler noted: "Where uncertainty as to the existence of negligence arises *from a conflict in the testimony* or because, the facts being disputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." 281 U.S. at 94 (emphasis added). This statement is then followed by a lengthy discussion of the evidence both from the Plaintiff and the Defendant. 281 U.S. at 95-98. *Gunning*'s enunciation of the long standing reasonable juror standard does not doom *Boeing*. On the contrary, *Gunning* is simply the natural corollary to the case at bar. If there is sufficient evidence to sustain a jury's verdict, the verdict must stand. Nothing in *Gunning* argues against an appellate court's consideration of all of the evidence, so long as all inferences from the evidence are made in support of the verdict. 281 U.S. at 93. The Fifth Circuit in the present case applied the reasonable juror

standard and found that under the evidence, as a matter of law, there was no duty, breach or cause in fact. There is no conflict between *Boeing* and this older authority.

3. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*

This 1962 admiralty case involved a dispute regarding injuries sustained by an employee of Atlantic, which performed stevedoring services for Ellerman. *Atlantic & Gulf*, 369 U.S. at 356. The jury found Ellerman to have been negligent, but found that Ellerman's negligence was not caused by a failure of Atlantic to perform its contractual obligations to Ellerman. The Court of Appeals reversed and entered judgment against Atlantic as well, asserting that the finding against Ellerman as a matter of law necessitated a finding against Atlantic. *Id.* at 358. In reversing and reinstating the jury verdict, this Court recognized the application of the Seventh Amendment and found no conflict in the jury's findings, based upon the law and the evidence. 369 U.S. at 364. A key factor in the decision was the Court of Appeals' failure to attempt to harmonize the jury's findings. This Court noted that searching for an inconsistency where consistency could be found was violative of the Seventh Amendment. *Id.*

Respondent concedes that the Seventh Amendment is a relevant consideration in all actions a United States Court of Appeals takes with regard to a jury finding. However, as noted below, this Court long ago addressed the constitutionality of judgments n.o.v. and directed verdicts, and the reversal of a jury verdict where judgment as a matter of law was appropriate. This is not a case of

allegedly inconsistent jury findings, but rather a case where the jury's findings were unsupported by the evidence. *Atlantic & Gulf* has no direct application to the case at bar. Despite Petitioners' valiant attempts to create one, there is no direct conflict between the *Boeing* standard and the established precedent of this Court. Indeed, *Boeing* is consistent with the logic and reasoning of this Court's most recent review in *Liberty Lobby, see supra* at 16-17.

IV. The Fifth Circuit's Ruling Does Not Result in a Violation of Petitioners' Seventh Amendment Rights.

It is well-settled that when a court grants a directed verdict or a judgment notwithstanding the verdict, the Seventh Amendment right to a jury trial has not been violated. *See, e.g., Galloway v. United States*, 319 U.S. 372, 389 (1943) (concluding that the Seventh Amendment does not deprive the federal courts of their power to enter a directed verdict when the evidence is insufficient as a matter of law); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967) (concluding that there is no Seventh Amendment bar to a district court or a reviewing court granting a judgment notwithstanding the verdict); *Whitsell v. Alexander*, 229 F.2d 47, 49 (7th Cir. 1956) (holding that trial court must grant directed verdict when evidence is such that, as a matter of law, reasonable jurors could not differ; explaining that directed verdicts do not infringe right to jury trial preserved by Seventh Amendment where question is one of law). *See also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979); *Colgrove v. Battin*, 413 U.S. 149, 156 (1973).

In *Galloway*, this Court stated that because of repeated Supreme Court decisions foreclosing this argument for nearly a century, general claims that the Seventh Amendment deprives federal courts of the power to render a directed verdict must fail. 319 U.S. at 389. This Court added that in 1791, the year the Seventh Amendment was ratified, common law rules allowed trial courts to withdraw cases from the jury because of insufficiency of the evidence. *Id.* at 389-90. Additionally, courts could dismiss an action on a party's demurrer on the basis of insufficiency of the evidence. *Id.* Therefore, even in 1791, the Seventh Amendment did not preclude a judge from determining whether evidence was sufficient for submission to the jury. *Id.* at 391.

Rule 50 of the Federal Rules of Civil Procedure provides the authority for federal courts to grant a judgment as a matter of law when there is no "legally sufficient evidentiary basis for a reasonable jury to have found for [the non-moving] party." FED. R. CIV. P. 50(a)(1). It is well-settled that Rule 50 does not violate the Seventh Amendment's guarantee of a jury trial. *Neely*, 386 U.S. at 321; *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *see also Galloway*, 319 U.S. at 389 (stating that the practice of rendering judgments as a matter of law has been explicitly approved by this Court's promulgation of Rule 50).

Petitioners' Seventh Amendment argument is spurious and does not raise a valid constitutional question worthy of review by writ of certiorari.

V. Petitioners' Asserted Error Applies to Only One of the Three Grounds Upon Which the Fifth Circuit Granted ICM Judgment as a Matter of Law and the Other Grounds are a Sufficient Basis for Upholding the Judgment.

Petitioners assert that the Court of Appeals relied upon the testimony of Harshfield for its entire analysis of Petitioners' gross negligence claim against ICM. This grossly misstates the Fifth Circuit's opinion. The Fifth Circuit found no breach of duty as a matter of law and fact, no cause in fact and implicitly recognized lack of foreseeability. Appendix A to Petition for Writ of Certiorari at 14-15 (hereafter "Petitioners' Appendix A").

A. The Court of Appeals' finding that no duty was breached as a matter of law was not based upon Harshfield's testimony.

The Fifth Circuit determined "[a]s a matter of law and fact, there was no breach of duty by ICM." Petitioners' Appendix A at 15. In making its finding of no breach of duty as a matter of law, the Court made specific reference to the fact that Texas law did not require mortgage companies to calculate property appraisals at one hundred percent of market value. Throughout this dispute, Petitioners and their expert, Mozingo, have asserted that because Harshfield did not base his tax escrow estimates on the full purchase price, he somehow violated Texas law and was therefore negligent. Petitioners ignore, as the Court of Appeals did not, that the statute which addresses the use of one hundred percent of market value

to perform tax appraisals is a portion of the Texas Property Tax Code which governs only the actions of governmental appraisal districts[11]. The fact that Petitioners never proved a proper standard of care by mortgage lenders calculating tax escrow estimates was implicit in this portion of the Court of Appeals' discussion. A failure of proof on the proper standard of care entitled ICM to judgment as a matter of law.

The Court of Appeals also noted that Harshfield, a former employee of ICM who at the time of trial had no employment relationship to ICM save as an expert witness, had determined that tax appraisal districts were not appraising properties at one hundred percent of market value. This evidence was not disputed by Petitioners' expert, Mozingo, or any other witness. This discussion was only one independent basis for the finding of no breach of duty as a matter of law, separate and apart from Petitioners' failure to establish or assert the proper standard of care. Further, it appears that this evidentiary discussion related to the Court's dicta reference to no breach of duty "as a matter of fact." Petitioners' Appendix A at 15. The mere fact that dicta is included in an opinion does not render impotent the entire opinion.

---

[11] TEX. TAX CODE ANN. § 26.02 (Vernon 1982), dealing with tax appraisals is a portion of the Property Tax Code (TEX. TAX CODE ANN. §§ 1.01-43.04 (Vernon 1982 & Supp. 1992)), which by its own terms governs only the actions of governmental "taxing units." *Id.* § 1.02.

B. The Fifth Circuit's finding of no cause in fact as a matter of law was not based upon Harshfield's testimony.

Contrary to Petitioners' assertion, a review of the Fifth Circuit's discussion of causation reveals no reliance upon Harshfield's testimony. Rather, Judge Barksdale refers to his earlier discussion regarding: (1) the fact that the IQ's themselves established as a matter of law that they could not be used as a predictor, let alone a guarantee, of future taxes, and (2) the fact that the only damages sought related to future tax expenses. Petitioners' Appendix A at 15, referencing 9-14.

Petitioners assert that because *they* believed the IQ's applied to future years, that belief constitutes evidence that the carefully qualified estimates were so intended. Petitioners' convenient interpretation of an unambiguous "estimate" which is "subject to change" is no evidence of ICM's intent in formulating the IQ's. Furthermore, Petitioners are precluded at this late date from asserting that any of their claims rest on the oral statements of Pulte personnel because Petitioners took the position throughout the controversy that the wrong complained of was the IQ tax estimate alone and not any oral representation regarding it. *See* Agreed Statement of the Case, Tr. 10:123.

Petitioners' tortured attempt to show an evidentiary basis for causation is ultimately futile. Despite Mozingo's conclusory opinions to the contrary, the undisputed evidence shows the following facts:

(1) Petitioners' homes were not appraised, or taxed, at their improved value at the time the homes were purchased;

(2) the taxes for the year in which Petitioners bought their homes were lower than the IQ estimates when annualized;

(3) Petitioners' homes were reappraised, just as the Important Notices warned they would be, shortly after the January following the home purchases;

(4) the taxes which exceeded the amounts estimated on the IQ's were the result of those new appraisals; and

(5) the damages sought were all related to those years after reappraisal.

Petitioners' contention that the reappraisals did *not* cause taxes to increase is logically ludicrous and without evidentiary support. The Fifth Circuit's ruling on the issue of causation was based upon the Petitioners' failure to present any credible evidence that ICM's actions caused the injuries complained of, not upon the Court's review of the testimony of Harshfield. Petitioners' lengthy argument regarding consideration of the evidence and the Seventh Amendment is irrelevant, as any such error with regard to the "duty" aspect of negligence would be harmless. Again, this alone justifies denial of the writ.

C. The Fifth Circuit's implicit finding of no foreseeability as a matter of law was not based on the testimony of Harshfield.

The Fifth Circuit recognized that under Texas law there are two elements to causation in a negligence action – cause in fact and foreseeability. Petitioners' Appendix A at 15. The Fifth Circuit addressed not only cause in fact, but foreseeability as well. The Court of Appeals noted the

uncontradicted evidence that ICM provided and the Petitioners each received and signed the Important Notices regarding future taxes at each real estate closing. *Id.* at 15. Texas substantive law requires that parties are charged with notice of the contents of the documents they sign and agreements they execute. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). The Court of Appeals' notation that, "ICM made clear at closing, through its Important Notice, that 'at the beginning of next year, your property will be reevaluated and your taxes computed on that reevaluation,' " Petitioners' Appendix A at 15, was an implicit recognition that ICM rendered any reliance by Petitioners upon the tax estimates in future years not foreseeable and unreasonable as a matter of law.

Again, this holding is not based upon the testimony of Harshfield, but upon the unambiguous terms of the Important Notices, undisputed facts and the law of Texas. Like the cause in fact ruling, this implicit holding is unassailed by Petitioners' arguments regarding improper review of the record and the Seventh Amendment and constitutes yet another independent ground for denial of the writ.

CONCLUSION

For the foregoing reasons, there is no valid reason to grant the Petition. The Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

J. EUGENE CLEMENTS
700 Louisiana, Suite 3500
Houston, Texas 77002
(713) 226-0600
(713) 228-1331 – Telecopier
Counsel of Record for Respondent

OF COUNSEL:

PORTER & CLEMENTS, L.L.P.
MICHAEL D. KIRBY
700 Louisiana, Suite 3500
Houston, Texas 77002

GILPIN, PAXSON & BERSCH
WILLIAM T. LITTLE
2300 First Interstate Tower
1300 Post Oak Boulevard
Houston, Texas 77056-3010

APPENDIX A

Excerpt from Brief of Appellee, p. 25

Because of the Constitutional right to a jury trial guaranteed by the Seventh Amendment, appellate review of a sufficiency of the evidence point is exceedingly narrow; the verdict must be upheld unless the facts and inferences point so strongly in favor of the Appellants that reasonable minds could not arrive at a contrary verdict. *Granberry v. O'Barr,* 866 F.2d 112, 113 (5th Cir. 1988) [citations omitted].

In reviewing the evidence to apply this standard, the Court must consider all the evidence and draw all reasonable inferences in favor of the Appellees, and:

> If there is an evidentiary basis upon which the verdict can be supported, the jury's determinations will be left undisturbed, even where there is substantial evidence that could have supported an opposite verdict.

Gibralter Savings v. L. D. Brinkman, 860 F.2d 1275, 1297 (5th Cir. 1988).

* * *

APPENDIX B

Excerpt from Appellee's Petition for Rehearing, p. 4

In its Opinion, the Court initially recognizes the "exacting" standard of appellate review such that a jury verdict may be reversed only where "the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary." Slip Op. at 1919 [citations omitted]. However, the Court disregards the corollary rule that, if there is evidence of such quality and weight that reasonable men might reach different conclusions, the Court may not invade the jury's fact-finding function. *Cranberry* [sic] *v. O'Bair* [sic], 866 F.2d 112, 113 (5th Cir. 1988). The Court also contradicts established principles in applying these standards by failing to consider *all* of the evidence or to do so "in the light and with all reasonable inferences most favorable to [the Homeowners]." *Boeing*, 411 F.2d at 374 [citations omitted]. So long as there is conflicting evidence to create a jury question, the jury's findings must be affirmed. *Boeing*, 411 F.2d at 375.

* * *